87-505

Supreme Court, U.S.
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No.

***

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

***

CHICK KAM CHOO, Et Al.,
Petitioners,

versus

EXXON CORPORATION, Et Al.,
Respondents.

(In the Court of Appeals Exxon Corporation, Et Al. vs. Chick Kam Choo, Et Al.)

***

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002

Joseph C. Blanks
909 Laurel
Beaumont, Texas 77701

Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

I.

Whether the Supreme Court should grant certiorari in order to achieve a uniformity of decisions among the courts of appeals by resolving a recently created conflict between the Fifth and Ninth Circuits, the Fifth Circuit holding in **Exxon Corporation vs. Chick Kam Choo**, 817 F.2d 307 (5 Cir. 1987) that where a federal court has previously dismissed a maritime case on grounds of forum non conveniens and the same case is subsequently filed in a state court, such federal court can, despite the terms and provisions of the Anti-Injunction Statute, 28 U.S.C. 2283, issue an injunction against the state court proceeding, while the Ninth Circuit, in the case of **Zipfel v. Halliburton Co., et al.**, 820 F.2d. 1438

9 Cir. 1987), has held directly to the contrary?

II.

Whether the Supreme Court should grant writ of certiorari to resolve the conflict between the decision below - ***Exxon Corporation vs. Chick Kam Choo, supra***, holding that, under the doctrine of federal maritime law preemption, a federal court may enjoin a state court from deciding the forum non conveniens issue under state law in a maritime case filed in state court - and the decisions of this Court such as **Atlantic Coast Line v. Brotherhood of Railway Workers,** 398 U.S. 281 (1970); **Amalgamated Clothing v. Richman Brothers,** 348 U.S. 511 (1954); **Mitchum v. Foster,** 407 U.S. 225 (1972); and **Vendo Co. v. Lektro Vend Corp.,** 433 U.S. 623 (1977), holding that even where the question before a

state court involves an area preempted by federal law, the Anti-Injunction Statute still prohibits a federal court from enjoining the state court action?

III

Whether the Supreme Court should grant writ of certiorari to resolve the important question of whether, in a 28 U.S.C. 2283 injunction case, a forum non conveniens dismissal in the federal court can ever act as res judicata with respect to a forum non conveniens determination by a state court in the same case, particularly where the applicable state law does not recognize the doctrine of forum non conveniens or utilizes criteria different from those employed by the federal courts or the facts applicable to such determinations are in some way different?

IV.

Whether this Court should grant writ of certiorari to resolve the important question of whether or not, after a party has removed a state court case to federal court and the case has been ordered remanded, such party can later secure an injunction prohibiting the state court from proceeding in the same case, despite the provisions of the Anti-Injunction Statute, 28 U.S.C. 2283?

V.

Whether the Supreme Court should grant writ of certiorari to clarify important questions dealing with the underlying policies of 28 U.S.C. 2283 and of equity, comity, federalism and abstention, particularly as they relate to a federal court's interference with state court proceedings in a case that has previously been dismissed in the federal court on grounds of forum non conveniens?

LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT AND IN THE COURT OF APPEALS

The Petitioners are:

Chick Kam Choo, Individually and as Administratrix and/or Representative of the Etate of Leong Chong, Deceased, and as Next Fried of Leong Choy Wan, Leong Choy Hur, Leong Choy Fong and Leong Choy Tan, Benton Musslewhite and Joseph C. Blanks.

The Respondents are:

Exxon Corporation
and
Esso Tankers, Inc.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY THE COURTS BELOW

1. The order and opinion of the federal district court dated May 15, 1986 granting an injunction against proceedings in the state district court of Harris County, Texas, involving the same matter. (Appendix I).

2. The opinion of the Court of Appeals in ***Exxon Corporation vs. Chick Kam Choo***, 817 F.2d 307 (5 Cir. 1987), affirming the district court's grant of injunction against the state court proceedings. (Appendix II).

GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

The final judgment of the Court of Appeals was entered May 21, 1987. The petition for rehearing and rehearing en banc was timely filed and overruled on June 24, 1987. This petition for writ

of certiorari was timely transmitted within ninety days of the order overruling the motion for rehearing and rehearing en banc. The jurisdiction of this Court is invoked under 23 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES WHICH THIS CASE INVOLVES

This case primarily involves construction and application of 28 U.S.C. 2283, the Anti-Injunction Statute.

STATEMENT OF THE CASE

Suit was initially filed in the federal district court of Houston, Texas, alleging causes of action under the Jones Act, 46 U.S.C. 688; the Death on the High Seas Act (DOHSA), 46 U.S.C. 761, et seq.; the general maritime law; and under state law for the wrongful death of Leon Chang, which occurred

while he was working on board a blue-water vessel owned and operated by an Exxon subsidiary based in the United States. The vessel in question flew a flag of convenience, with the beneficial flag state being the United States.

The federal district court dismissed the case, holding that Chang was not a Jones Act seaman, DOHSA was inapplicable because the accident occurred within the territorial waters of Singapore and that the other claims should be dismissed on grounds of forum non conveniens. The district court's dismissals were affirmed by the Court of Appeals, Fifth Circuit, 699 F.2d 693 (5 Cir. 1983), cert den., 464 U.S. 826. (*"Choo I"*).

Thereafter, Madam Choo filed suit on the same basic claims in the state court and Exxon immediately removed on grounds of diversity of citizenship to the

federal district court. Though Madam Choo filed a motion to remand, the district court, Black, J., denied the motion, dismissed on grounds of res judicata and imposed sanctions. On appeal, the Court of Appeals reversed, holding that the motion to remand should have been granted because of the presence of aliens on both sides of the docket. 764 F.2d 1148 (5 Cir. 1985)("Choo II").

Immediately after the Fifth Circuit issued its mandate in Choo II, Exxon filed an original action in the United States District Court for the Southern District of Texas, Houston Division, and again was assigned to Judge Black. Exxon requested Judge Black to grant a permanent injunction enjoining Madam Choo from proceeding in the state court or in any other court in the United

States. Madam Choo opposed the request, asserting lack of jurisdiction, the bar of 28 U.S.C. 2283 and that the injunction was inappropriate under principles of equity, comity, federalism and abstention. At the hearing on Exxon's request for an injunction, Exxon did not offer any testimony or ***any other evidence*** to prove identicality of objective facts as between the federal and state forum non conveniens laws or to prove that Exxon had no adequate remedy at law because of some inability on the part of the state court to handle issues of direct estoppel, res judicata and forum non conveniens. The federal district court nevertheless summarily granted a permanent injunction and again sanctioned Madam Choo and her lawyers.

After Madam Choo appealed, the Court of Appeals, per Judge Gee - though

conceding that the forum non conveniens dismissal by the federal court did not directly estop the state court from denying a forum non conveniens motion because, under Section 71.031 of Texas' Civil Practice and Remedies Code (Texas' "open forum law"), the Supreme Court of Texas would probably hold that dismissals on such grounds are never permitted - nevertheless held that because the decedent was involved in a maritime accident the state court was preempted from deciding the forum non conveniens issue any way but as decided by the federal district court. 817 F.2d at 324, 325. Judge Clark concurred in the result but based his concurrence on the fact that the federal forum non conveniens ruling barred "relitigation" of that issue by the state court, within the meaning of the relitigation

exception of 28 U.S.C. 2283. Judge Clark did state that, in order to achieve a majority result, he would secondarily agree that federal maritime law preempted the state court from determining the forum non conveniens issue contrary to federal forum non conveniens law. 817 F.2d at 325. Judge Reavley dissented, holding that the state court should be left to decide the forum non conveniens issue under state law, without interference by the federal court, all as mandated by the Anti-Injunction Statute, 28 U.S.C. 2283. id. at 325, 326.

In the meantime, in another maritime case, ***Zipfel v. Halliburton Co., et al.***, 820 F.2d 1438 (9 Cir. 1987), mtn. for reh. pending, a unanimous panel of the Court of Appeals for the Ninth Circuit held directly contrary to the Fifth

Circuit in this case. The Ninth Circuit held that the Anti-Injunction Statute, 28 U.S.C. 2283, prohibits a federal court, which has dimissed a maritime case on grounds of forum non conveniens, from later enjoining a state court from proceeding in the same case.

Because of the direct conflict between these two recent decisions, the decision of the Fifth Circuit in this case, and the decision of the Ninth Circuit in *Zipfel*, and because of the conflict the court below has generated - in holding that the doctrine of preemption can be used to authorize a federal court to enjoin a state court action - with the Supreme Court decisions mentioned in the "Questions Presented for Review", and for other reasons stated in the "Questions Presented for Review", the petitioners

seek Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING PETITION FOR WRIT OF CERTIORARI

I.

This Court Should Resolve The Conflict Between The Decision Of The Court Below And The *Zipfel* Decision Of The Ninth Circuit.

This case involves a number of issues which are of considerable public importance. These include, among others, federalism, abstention, comity, states rights, maritime policy, preemption, the Anti-Injunction Statute, res judicata, removal and remand statutes, federal jurisdiction, forum non conveniens and, at the very foundation of our federal republic, the judicial relationship between the federal and state courts.

Congress, in order to reinforce the constitutional principles of federalism,

enacted the so-called Anti-Injunction Statute, 28 U.S.C. 2283, which provides:

> A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

The landmark case involving the Anti-Injunction Statute is this Court's decision in ***Atlantic Coastline Railroad Co. v. Brotherhood of Locomotive Engineers***, 398 U.S. 281 (1970). In that case this Court defined the scope of the Statute, stating that it is an "absolute prohibition against enjoining state court proceedings, **unless the injunction falls within one of three specifically defined exceptions**"; that the statute "is not a statute conveying a broad general policy for appropriate *ad hoc* application"; that, first, it must be determined that the injunction is

"proper under general equitable principles" and, if it is, it must then be clearly shown that it is "based on one of the specific statutory exceptions to 28 U.S.C. 2283"; that the exceptions "should not be enlarged by loose statutory construction"; and that therefore, as Judge Reavley observed in his dissent in this case, "any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." 398 U.S. at 286, 287, 297; emphasis ours. This Court has confirmed such principles of statutory federalism in other decisions, including Chief Justice Rehnquist's opinion in ***Vendo Company v. Lektro Vend Corp.***, 423 U.S. 623 (1977). See also, ***Amalgamated***

Clothing Workers of America v. Richman Bros., 348 U.S. 511 (1954); and *Mitchum v. Foster*, 407 U.S. 225 (1972).

With the foregoing principles in mind, we shall now examine the two conflicting decisions, the decision of the Fifth Circuit in this case and of the Ninth Circuit in *Zipfel*. In the Fifth Circuit decision, the judge who wrote the majority opinion, Judge Gee, strangely without mentioning the Anti-Injunction Statute, concluded that, generally speaking, where a federal district court dismisses a case on grounds of forum non conveniens and the same case is filed in a state court, the federal court forum non conveniens dismissal precludes the state court from reconsidering the forum non conveniens issue unless "objective facts relevant to the issue that materially alter the considerations

underlying the previous resolution" are shown. 817 F.2d at 311-314. Although Judge Gee improperly assumed - in the face of Exxon's failure to offer any evidence to that effect in the federal district court - that the objective facts underlying the federal and Texas state court's resolution of that issue would ordinarily be the same, he conceded that Texas has a "peculiarity" in its law, namely its open forum statute, Sect. 71.031 of the Civil Practice and Remedies Code,[1] the effect

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1. Sect. 71.031 provides:

> (a) An Action for damages for the death or personal injury of a citizen of this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
>
> (1) a law of the foreign state or country or of this state gives a

of which Judge Gee discusses:

> Madam Choo contends that the existence of Section 71.031 precludes *forum non conveniens* analysis in a personal injury or death case filed in a Texas state court; and, given the broad hints thus far dropped by the Texas Supreme Court, it is hard to disagree that this may be its view of the statute. From this premise, she concludes that a *forum non conveniens* dismissal of such an

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fn.1 cont.

> right to maintain an action for damages for the death or injury;
> (2) the action is begun in this state within the time provided by the laws of this state for beginning the action; and
> (3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.
(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

> action by a federal court cannot be *res judicata* in a Texas state court because Section 71.031 creates a potentially dispositive legal issue that has not yet been fully and finally litigated between the parties. Again, as a general matter, we can find no fault with her logic: When a federal court and a Texas state court have concurrent and *independent* jurisdiction over a personal injury or death action, in the end Section 71.031 may well be construed by the Texas Supreme Court to preclude direct estoppel in the state courts by a *forum non conveniens* dismissal in the federal courts.

817 F.2d at 316.[2]

But, Judge Gee reasons, because this case is a "maritime case", the state

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2. This view of Texas law seems consistent with Article 1, Sect. 13 of the Texas Constitution, commonly referred to as Texas' "open courts" provision. See ***LeCroy v. Hanlon***, 713 S.W.2d 335, 340-341 (Tex.1986) and ***Nelson v. Krusen***, 678 S.W.2d 918, 921 (Tex. 1984). This Court in ***Pennzoil v. Texaco***, 107 S.Ct. 1519 (1987) has recognized and discussed Texas' open courts provision in some detail. ***id.*** at 1526, 1528. Also, in addition to the authorities discussed by Judge Gee, 807 F.2d at 314-16, see ***Allen v. Bass***, 47 S.W.2d 426 (Tex.App.-El Paso 1932, writ ref'd)(discussing Art. 4678, R.C.S., the predecessor to Sec. 71.031).

court's jurisdiction is derivative and it is bound to apply the general maritime law of the United States, including federal forum non conveniens law. 817 F.2d at 316-325. As can be seen, this conclusion was reached by Judge Gee through a tortuous process of reasoning and without one word of discussion of whether or not the Anti-Injunction Act would permit an injunction based upon the doctrine of "preemption". *id.* Judge Clark, though concurring in the result, was more wrong than Judge Gee and argued that the invocation of the doctrine of preemption was unnecessary because the forum non conveniens decision by the federal court was res judicata of a later such determination by the state court. 817 F.2d at 325. Judge Reavley, in a short but strong dissent, incisively implied

that the doctrine of preemption was not one of the exceptions expressly included within the Anti-Injunction Statute and, therefore, pursuant to the mandate of ***Atlantic Coastline Railroad Co.***, "any doubts as to the propriety of a federal injunction of a state court proceeding should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controvesy." 817 F.2d at 325, 326. He squarely held that the injunction issued by the federal district court in this case should have been reversed and dissolved and his position is completely consistent with the decision of the Ninth Circuit in ***Zipfel***.

Clearly, as we stated above, the ***Zipfel*** decision, as is Judge Reavley's dissent, is in direct conflict with the

majority opinion in ***Choo III*** by the Fifth Circuit. In ***Zipfel***, another maritime case, the foreign plaintiffs filed suits simultaneously in the state court of Texas and in the federal district court in California. The federal district court dismissed the foreign plaintiffs' cases on grounds of forum non conveniens and they then activated their cases in the state court of Texas. The federal district court in California then granted a permanent injunction, enjoining the Texas state court from proceeding and the foreign plaintiffs appealed. The Ninth Circuit reversed the grant of the injunction against the state court proceeding and in so doing stated:

> The first exception to the Anti-Injunction Act does not apply here, because there is no express statutory authorization for an injunction in this situation. The

second exception applies to the American seaman's lawsuit, because, under our holding in this case, the district court will retain jurisdiction over that lawsuit. *See Alton Box*, 682 F.2d at 1271. This exception does not apply, however, to the foreign seamen's lawsuits because the district court no longer has jurisdiction over those suits. *Id.* The district court held that jurisdiction was more properly in a foreign forum and dismissed the foreign seamen's cases. At that point there was no need for an injunction to protect the district court's jurisdiction. *Id.*

The third exception to the Anti-Injunction Act similarly does not support the district court's injunction. This court has held that a district court may grant an injunction to protect the *res judicata* effect of its judgment "where the federal litigant has prevailed on the merits, yet is threatened with burdensome and repetitious relitigation of the same issues in a multiplicity of actions." *Golden*, 786 F.2d at 1427. Defendants argue that a determination on the merits is not required for an injunction against state court actions when a district court has dismissed a lawsuit for *forum non conveniens* arising in the same matters. The wording of our cases, however, is explicit, and refers to decisions on the merits. *See Golden*, 786 F.2d at 1427; *Midkiff v. Tom*, 725

> F.2d 502, 504 (9 Cir. 1984). Here, defendants have prevailed on a procedural point pertaining to the propriety of the prosecution of the foreign seamen's lawsuit in a United States district court. No judgment on the merits has been rendered. The grant of the injunction against the foreign seamen prosecuting their lawsuits in state court violated the Anti-Injunction Act and was an abuse of discretion.

820 F.2d at 1449.

In view of the above elucidated clear conflict between the unanimous decision of the Ninth Circuit in ***Zipfel*** and the majority decision of the Fifth Circuit in ***Choo***, this Court should grant writ of certiorari in this case so that it can resolve the conflict and maintain a uniformity of decisions in the courts of appeals. Moreover, the importance of the issues involved in the resolution of such conflict - such as those pertaining to federalism, comity, abstention and non-interference by the federal courts

in state court actions - magnify the need for this Court's intervention. Indeed, the implications of the conflicting rationale of these two decisions extends in scope not only to forum non conveniens determinations but to all decisions which are not final upon the merits. Thus the question is squarely presented as to whether the "relitigation" exception in 28 U.S.C. 2283 pertains ***only*** to decisions upon the merits, as was held by the Ninth Circuit, or does it permit the use of injunctions against state court interlocutory and procedural actions, which are not final decisions upon the merits of the case. Because the number of situations wherein procedural decisions might become involved in efforts to secure injunctions against state court actions are so numerous and

vast, it is essential, we suggest, for this Court to intervene and clarify just what the scope of the "relitigation exception" is within the context of forum non conveniens and other procedural determinations.

II.

Certiorari Should Be Granted Because The Decision Of the Majority In *Choo*, Holding That Federal Maritime Law Preempts A State Court From Deciding The Issue Of Forum Non Conveniens In A Case Before It On The Basis Of State Law, Is In Direct Conflict With A Number Of Supreme Court Cases As Hereinafter Discussed.

One of the most disconcerting things about Judge Gee's elaborate opinion in *Choo* is that he discusses preemption without *ever* pausing to mention, ***even in one sentence***, the Anti-Injunction Statute and its relationship to the doctrine of preemption. Judge Reavley, in his dissent, went right to the heart of the matter and dissented because,

obviously, "federal preemption" is *not* one of the exceptions expressly named in the Anti- Injunction Statute.

This issue is extremely important because a logical analysis of what Judge Gee is saying is ominous. His rationale will apply not only in cases involving injunctions under the Anti-Injunction Statute, but, if allowed to stand, it will affect *any* case in which a maritime plaintiff files suit in state court, as he certainly is allowed to do under the Jones Act, 46 U.S.C. 688, and presumably under the general maritime law, **see Offshore Logistics v. Tallentire**, 91 L.Ed.2d 174 (1986), and, if a forum non conveniens motion should be presented in any such case, the state court would be forced to apply federal forum non conveniens principles in deciding such motion. Such a broad and

sweeping extension of the doctrine of preemption would seem to fly directly in the face of **Parsons v. Chesapeake & Ohio Rwy. Co.**, 375 U.S. 371 (1963) and **Missouri v. Mayfield**, 340 U.S. 1 (1950). In those two cases, this Court made it clear that forum non conveniens determinations are basically procedural matters which each court, whether it be state or federal, must decide in accordance with its own law. See further discussion of these cases, *infra*.

In any event, as to whether or not a federal court may resort to the doctrine of federal preemption in order to issue an injunction against a state court proceeding, candidly it is very shocking to us that Judge Gee utilized such doctrine ***without ever mentioning the cases of this Court in which it has been***

expressly mandated that the doctrine of preemption could not be so utilized.

In ***Amalgamated Clothing***, this Court discussed this question in depth, 99 L.Ed. at 607-610. In that case the proponents of the federal injunction contended that the state court's consideration of the same case was preempted by the Taft Hartley Act, 29 U.S.C. 158. This Court's response was as follows:

> In the face of this carefully considered enactment, we cannot accept the argument of petitioner and the Board, as amicus curiae, that Sec. 2283 does not apply whenever the moving party in the District Court alleges that the state court is "wholly without jurisdiction over the subject matter, *having invaded a field preempted by Congress.*" **No such exception had been established by judicial decision under former Sec. 265. In any event, Congress has left no justification for its recognition now.** This is not a statute conveying a broad general policy for appropriate ad hoc application. Legislative policy is here expressed in a clear-cut prohibition qualified

only by specifically defined exceptions.

99 L.Ed.at 607-608; emphasis ours. This Court and many circuit courts have expressly reaffirmed the above. See *Atlantic Coast Line*, 398 U.S. at 254 ("A federal court does not have inherent power to ignore the limitations of Sec. 2283 and to enjoin state court proceedings *merely because those proceedings interfere with a protected federal right or invade an area preempted by federal law, even when the interference is unmistakably clear*"); *Mitchum v. Foster*, 407 U.S. at 636-639 ("... the prohibitions of Sec. 2283 exist separate and apart from those traditional principles [of preemption in the anti-trust field] and we cannot read the 'intended scope' language *as rendering this specific and long-stand-*

ing statutory provision inoperative simply because important federal policies are fostered by the [anti-trust] statute under which the injunction is sought .... Given the clear prohibition of Sec. 2283, *the courts will not sit to balance and weigh the importance of various federal policies in seeking to determine which are sufficiently important to override historical concepts of federalism underlying Sec. 2283; by the statutory scheme it has enacted, Congress has clearly reserved this judgment unto itself*"); **T. Smith & Sons, Inc. v. Williams**, 275 F.2d 397, 407 (5 Cir. 1960); **N.L.R.B. v. North-Finch Co.**, 434 F.2d 971, 975-976 (8 Cir. 1970); **N.L.R.B. v. Swift & Co.**, 233 F.2d 226 (8 Cir. 1956); **Alton Box Board v. Espirit de Corp**, 682 F.2d 1267, 1273 (9 Cir.

1982); and **Landi v. Phelps**, 740 F.2d 710, 713 (9 Cir. 1984).

The rationale which emerges from these decisions is that if 28 U.S.C. 2283 is to be obviated by preemption notions it can only be done through the "expressly authorized" exception, which of course *must involve a statute* which expressly authorizes an injunction. In the first place, as Judge Gee conceded, 817 F.2d at 320, maritime forum non conveniens is a common law doctrine, not involving a statute, and there is nothing in the Jones Act or DOHSA that even hints at express authorization of an injunction against state court proceedings. As reasoned by Chief Justice Rehnquist, if Congress had wanted the federal courts to have the power to enjoin a state court with regard to a particular federal policy

area it would have expressly so authorized it in a statute. ***Vendo Co.***, 433 U.S. at 639. Since Congress has not seen fit to ***expressly*** authorize a federal court to enjoin a state court with regard to maritime forum non conveniens, Judge Gee and the Fifth Circuit erred in utilizing the doctrine of preemption to affirm the injunction in this case.

Judge Reavley, in his dissent, referred to Judge Gee's utilization of the doctrine of preemption as a "bold new rule of preemption" and it is "bold" only in the sense that it is the *only* decision we can find that takes a position contrary to such authoritative decisions of this Court as ***Amalgamated Clothing***, ***Atlantic Coast Line***, ***Mitchum v. Foster*** and ***Vendo Co. v. Lektro***. The fact that ***Choo III*** represents a signifi-

cant encroachment upon the integrity of statutorily expressed anti-injunction federalism, is all the more reason, we suggest, for this Court to make it clear that the Anti-Injunction Statute means what it says; that this Court's pronouncement in ***Atlantic Coast Line*** that the Anti-Injunction Statute exceptions will be narrowly construed is still the law; and that, as expressly stated in ***Amalgamated Clothing***, ***Atlantic Coast Line***, ***Mitchum v. Foster*** and ***Vendo***, federal preemption is simply ***not*** one of the exceptions in the Anti-Injunction Statute and no injunction can be allowed which rests upon such doctrine.

Lastly, we must pause to note that additional untoward consequences will flow, if the Fifth Circuit decision is allowed to stand, from the fact that the

Fifth Circuit has utilized the doctrine of preemption to nullify the Texas open forum law in admiralty cases. We are referring to the fact that such issue is one which should be decided by the Supreme Court of Texas, as Judge Reavley suggested, 817 F.2d at 326, and not by a federal appellate court.

III.

Certiorari Intervention Is Also Proper, We Respectfully Suggest, Because The Fifth Circuit's Decision Runs Counter To Previous Supreme Court Authority Holding That Forum Non Conveniens Determinations Are Procedural And do Not Constitute Res Judicata.

As we mentioned above, while Judge Gee and the Fifth Circuit did concede that the doctrines of res judicata and/or direct estoppel would not apply with respect to Texas' open forum law, he did improperly contradict previous Supreme Court authority and decisions of other federal courts in holding that, generally speaking, a federal court

forum non conveniens decision can be res judicata or directly estop a determination of that issue by a state court. Certiorari review of such holding is important because, if the Fifth Circuit decision is left to stand, it presents an aberrational intrusion into the scheme previously prescribed by this Court whereby state courts would be free to make procedural determinations under their own procedure, without interference from the federal courts, and that a forum non conveniens determination is such a procedural matter.

This question has two important perspectives to it as far as this case is concerned: the first is whether or not a forum non conveniens determination is *procedural* to the extent that it can never constitute res judicata in the sense of the "relitigation exception"

contained in 28 U.S.C. 2283 and the second is whether or not the doctrine of federal preemption, in a maritime context, can *ever* be held to preempt *procedural* determinations by a state court. As to the first question, in *Parsons v. Chesapeake Railway Co.* a state court, in a FELA case, dismissed the case on grounds of forum non conveniens. The plaintiff did not appeal. Instead, he filed a complaint grounded on the same cause of action in the federal court in Illinois. The defendant filed a motion to transfer the case under 28 U.S.C. 1404(a) to the federal district court for the Western District of Michigan. The federal district judge denied the motion and the defendant sought a mandamus from the Court of Appeals to compel the judge to order the transfer. The Seventh Circuit Court of

Appeals eventually granted the mandamus, directing the transfer. Its ruling was based primarily upon the proposition that the ruling of the state court, granting the forum non conveniens dismissal, was entitled to res judicata effect, thus compelling the federal court to also transfer the case (recognizing that the principles governing a 28 U.S.C. 1404(a) transfer are generally the same as those involved in a forum non conveniens determination).

After granting certiorari, this Court squarely held that the "principles of res judicata are not applicable" to a decision on the forum non conveniens question by one court, when the same action is later filed in another court. This Court discussed thoroughly why this is true. It pointed out that inevitably there are different considerations with

respect to each court. For example, it pointed out that the congestion of the docket, which relates to the "public interest" factors which should be considered by each court, may differ with regard to each court. And other matters may be differently considered. Moreover, the rules governing a forum non conveniens determination in one court may be different from the rules governing forum non conveniens determinations in the other court. As the Supreme Court noted in ***Parsons***:

> The discretionary determinations of both the state and federal courts in this case required, to be sure, evaluations of similar, but by no means identical, objective criteria. However, since the material facts underlying the application of these criteria in each forum were different in several respects, principles of *res judicata* are not applicable to the situation here presented.

375 U.S. at 72-73. ***Parsons v. Cheasapeake*** stands for the firm proposi-

tion that forum non conveniens determinations generally are not entitled to *res judicata* or *collateral estoppel* effect.

There is another reason why the proposition enunciated in ***Parsons*** is correct. In ***Missouri v. Mayfield***, again an FELA case (we do not need to remind this Court that the Jones Act derives its power and authority from the FELA), the plaintiff filed suit in the state court of Missouri and such court denied a forum non conveniens motion, making it clear that it felt it was compelled to do so by virtue of federal law on the subject of forum non conveniens in FELA cases. This Court reversed and remanded, with instructions to the Missouri Supreme Court that it should decide the forum non conveniens question in accordance with its ***own*** procedural notions and policies. This

Court held that the forum non conveniens question is determined in accordance with "procedural policy"; that a state may reject or it may accept the doctrine for ***all*** causes of action begun in its courts (as the Texas' open forum law apparently rejects the doctrine for ***all*** causes of action that qualify under such law) or it may apply its own principles or notions as to each particular case; and, in the final analysis, the Supreme Court stated:

> Therefore, if the Supreme Court of Missouri held as it did because it felt under compulsion of federal law as enunciated by this Court so to hold, it should be relieved of that compulsion. ***It should be free to decide the availability of the principles of forum non convenines in these suits according to its own local law.*** To that end we vacate the judgment of the Supreme Court of Missouri and remand the cause to that Court for further proceedings not inconsistent with this opinion.

340 U.S. at 5; emphasis ours.

The *Mayfield* rule has been reaffirmed many times. See, e.g., **Norfolk & Western Railway Co. v. Beatty**, 400 F.Supp. 234 (S.D.Ill.1975), aff'd 96 S.Ct. 439. In *Norfolk & Western*, the court stated that the "state rules on forum non conveniens govern in FELA *and Jones Act matters*" filed in the state court because they are procedural in nature. 400 F.Supp. at 237. See also discussion in **Wright & Miller**, *Injunction Against State*, Sec. 4226, p.340 et. seq. and the cases there cited; **Mizokami Bros v. Mobay Chemical Corp.**, 660 F.2d 712 (6 Cir. 1981) (holding that the plaintiff could relitigate the forum non conveniens issue in a Missouri federal district court even though it had been determined adversely to him in an Arizona federal district court); **Domingo v. States Marine Lines**, 340 F.Supp. 811 (S.D.N.Y.

1972) (holding that the prior action of a state court on grounds of forum non conveniens was not res judicata of the forum non conveniens motion before a federal court because "[t]hese decisions are not res judicata as plaintiff argues, and will not be even if they had been made by the courts of New York, rather than Delaware", citing *Parsons*, 340 F.Supp. at 817.); **Roth v. Bank of Commonwealth**, 583 F.2d 527 (6 Cir. 1977)(the relitigation exception under Section 2283 does not apply to procedural matters); **Southwest Airlines Co. v. Texas Intern'l Airlines, Inc.**, 546 F.2d 84 (5 Cir. 1977), cert den. 98 S.Ct. 117; **Lamb Int. v. Kiroff**, 549 F.2d 1052 (6 Cir. 1977), cert den. 431 U.S. 968 (1977); and **International Machinists and Aerospace Workers v. Nix**, 512 F.2d 125 (5 Cir. 1975).

Indeed, several state courts have held that they had the right to deny forum non conveniens motions, even though the very same case had previously been filed in the federal court and the federal court had granted a forum non conveniens motion. **Kahn v. United Technologies Corp.**, 16 Aviation Cases, 17, 651 Conn. (Sup.Ct. 1981); **Boskoff v. Boeing Co.**, 16 Aviation Law Reports, 17, 753 (Sup.Ct.N.Y. 1981); and **Aboujdid v. Gulf Aviation Co.**, 108 Misc.2d 175, 437 N.Y.Supp.2d 219, aff'd 448 N.Y.Supp.2d 427 (1st App. 1982).

And from a federal court perspective, this very question was decided in **Prack v. Wiesinger**, 276 F.2d 446 (4 Cir. 1960). In ***Prack*** the plaintiffs filed suit for injuries sustained while riding in the defendant's automobile. The accident occurred in West Germany, the

plaintiff was a citizen of West Germany, and the defendant was an American who was stationed in West Germany at the time. The plaintiff first filed suit in the state court of Virginia and the cause was removed to the federal court. The federal court then dismissed the action on grounds of forum non conveniens. Thereafter, the plaintiff commenced a similar action in another state court, based upon the same facts, for an amount "less than $10,000.00", and the defendant went back to the federal court and obtained an order that the "removed action be dismissed with prejudice to prosecution of the same cause of action in any court, State or Federal, within the United States." The Court of Appeals reversed, and in so doing stated:

We are of the opinion that Miss Prack's second point of error is well taken. ***The general rule as to the power of a court to determine its own jurisdiction*** is stated in 21 C.J.S. Courts sec. 113 (1940), as follows: "Every court has judicial power to hear and determine, or inquire into, the question of its own jurisdiction, both as to parties and as to subject matter, and to decide all questions, whether of law or fact the decision of which is necessary to determine the question of jurisdiction ...." See *Stoll v. Gottlieb*, 1938, 305 U.S. 165; *Fireman's Fund Ins. Co. v. Railway Express Agency*, 6 Cir., 1958, 253 F.2d 780, 784; *Hardy v. Bankers Life & Cas. Co.*, 7 Cir., 1956, 232 F.2d 205, 209; *Hospoder v. United States*, 3 Cir. 1953, 209 F.2d 427, 429; *Taylor v. Hubbell*, 9 Cir. 1951, 188 f.2d 106, 109; *Sullivan v. State of San Paulo*, 2 Cir. 1941, 122 F.2d 355, 358; ... ***These authorities compel the conclusion that the District Court, Alexandria Division, by its order dated September 24, 1959, improperly invaded the prerogative of the state court of Fairfax County to determine its own jurisdiction*** in the last of the three cases instituted by Miss Prack, involving $9,999.99. Weisinger's contention that the District Court was not attempting to determine the state court's jurisdiction but was merely giving effect to the doctrine of collateral estoppel by judgment, is without merit. While the District

> Court could, and actually did, in effect, apply the doctrine of collateral estoppel by judgment in determining its own jurisdiction, ***it is precluded from applying that or any other doctrine to determine the jurisdiction of the state court.***

276 F.2d at 450, 451; emphasis ours.

This Court should grant writ of certiorari to reconcile the conflict between the holding and rationale of the court below, namely Judge Gee's majority opinion, and the Supreme Court's decisions in ***Parsons*** and ***Mayfield*** and the cited decisions of other courts, particularly ***Prack v. Weisinger***. In sum, with regard to the first perspective we have raised with respect to whether a forum non conveniens determination is "procedural" or "substantive", it is important for the Court to grant certiorari and reaffirm that the forum non conveniens issue is

procedural in nature and always should be determined in accordance with the forum court's own law; that the "relitigation exception" of 28 U.S.C. 2283 does not include procedural decisions, such as forum non conveniens determinations; and that forum non conveniens determinations do not constitute "res judicata" within the meaning and intent of matters that may not be relitigated under the Anti-Injunction Statute.

As to the second perspective, involving the issue of how "procedural" determinations relate to preemption under the federal maritime law, Judge Gee conceded that not all maritime matters are preempted and that "like other questions arising under the Supremacy Clause, questions of federal preemption in the maritime context admit of no simple answer". 817

F.2d at 316.[3] And in those instances where the courts have held that federal maritime law does preempt state law it has involved substantive, *not procedural*, issues *or* express statutory authority. See, e.g., **Garrett v. Moore-McCormick**, 317 U.S. 239 (1942) (Court held that the burden of proof issue was one of "substance", not "a mere incident of procedure", 347 U.S. at 249) and *Offshore Logistics, Inc. v. Tallentire* ("the conflicting [wrongful death] standard was not derived just from general federal maritime law, it was explicitly provided for by federal

---

3. See, for decisions where it was held that federal maritime law does not preempt, **Wilburn Boat Co. v. Fireman's Fund Ins. Co.**, 348 U.S. 310 (1965); **Askew v. American Waterways Operators**, 411 U.S. 325 (1972); and **Grant-Smith-Porter Ship Co. v. Rhode**, 257 U.S. 469 (1922).

legislation directly on point", 91 L.Ed.2d at 1931).

As we have already noted, the federal forum non conveniens doctrine is a common law doctrine, **Gulf Oil v. Gilbert**, 330 U.S. 501 (1947), and is a matter of procedure, ***Missouri v. Mayfield***; **Sibaja v. Dow Chemical Co.**, 757 F.2d 1215 (11 Cir. 1981), cert den. 106 S.Ct. 347 (1986); and ***Norfolk & Western Railway Co. v. Beatty, supra.*** But more important to the disposition of this case is that, once again, the question at hand must be considered in the context of 22 U.S.C. 2283. In doing that we find, as stated by the Supreme Court in ***Amalgamated***, that areas of preemption are not delimited "by fixed metes and bounds" and that what is "within exclusive federal authority may first have to be determined by this

Court to be so". 99 L.Ed. at 608.

Thus, since the forum non conveniens question is procedural in nature, no statute gives the force of preemption to federal maritime forum non conveniens law and this Court has not previously addressed that precise issue, we suggest, as was suggested in ***Amalgamated***, that this Court grant certiorari to determine whether maritime forum non conveniens law is "within exclusive federal authority".

IV.

Another Reason The Court Should Grant Certiorari Is To rule Upon The Question Of Whether Or Not A Defendant Who Has Been Unsuccessful In An Attempt To Remove A State Court Action Under The Removal Statutes Can Thereafter Rely Upon the Anti-Injunction Statute For The Purposes Of Securing An Injunction By The Federal Court Against Those Same State Court Proceedings.

In this case, as the facts reveal, when the plaintiffs first filed suit in

the state court, the defendants removed such proceedings to the federal district court and the federal district court denied the plaintiffs' motion to remand; the cause was appealed to the Fifth Circuit and the Fifth Circuit reversed, holding that the federal district court had erred in failing to remand the case to the state court and ordered that the case be remanded. Immediately following the defendants' unsuccessful attempt to utilize the removal statutes, the defendants then went back to the same federal district court and got a permanent injunction, enjoining the state court from proceeding. This kind of procedural manuvering smacks of fatally inconsistent judicial actions (i.e. judicial estoppel), particularly since, in order to remove a cause to the federal court a party has to accept the

fact that the federal court would have jurisdiction over the proceedings, see ***American Fire and Casualty Co. v. Finn***, 341 U.S. 6 (1951), when in fact, in this case, the same federal court had already ruled that it did not have jurisdiction or that it would decline jurisdiction over the proceedings. Moreover, the removing party also has to assume that the state court would have jurisdiction over the same proceedings. See ***Lambert Run Coal Co. v. Baltimore & Ohio Ry. Co.***, 258 U.S. 377 (1922). Otherwise such party's remedy is to move for dismissal for lack of jurisdiction in the state court. In any event, the utilization of the removal statutes would seem to be inconsistent with the position taken in the injunction proceeding, namely that because the federal court had declined jurisdiction

(via forum non conveniens principles) the state court was precluded from accepting jurisdiction. In other words, it was the position of Exxon in the injunction suit that neither the state court nor the federal court could accept jurisdiction, although in the removal action Exxon had to have assumed that that same jurisdiction existed in both courts in order for the removal of the case to be proper.

The Fifth Circuit ignored this issue and we point out that its decision and holding thereby constitutes a conflict with the rationale of **Southern California v. Harper**, 273 F.2d 715 (5 Cir. 1960). While such conflict is with a decision within its own circuit, it does constitute a conflict involving important federal policy considerations (i.e. how the removal statutes interrelate with the Anti-Injunction

Statute). As was stated in ***Southern California v. Harper***:

> The policy against federal interference with a state suit previously filed is of long standing and is a necessary objective in maintaining a balanced federal-state relationship. It is particularly applicable in a case such as the instant case **when apparently the complaint filed in the federal court seeks to use the declaratory judgment statute and the equitable remedy of injunction as substitutes for a non-existent right of removal.** *Kaufman Rudeman, Inc. v. Cohn and Rosenberger*, 2 Cir., 1949, 177 F.2d 849; *Thompson v. Moore*, 8 Cir., 1940, 109 F.2d 372.

273 F.2d at 720.

V.

Lastly, This Court Should Grant Certiorari In Order To Reaffirm The Sacred Principles Of Federalism, Equity, Comity And Abstention.

The Fifth Circuit, though expressly and strongly urged to do so in this case, did not address itself to principles of equity, federalism, comity and abstention. Even if we assume ***arguendo***

that the district court had the power, by virtue of the third exception to Section 2283, to stay the proceedings in the state court, such power should not have been exercised without regard to equitable considerations. "A party seeking an injunction must always satisfy the usual equitable tests for an injunction of irreparable injury and the absence of an adequate remedy at law." 18 C.Wright, A.Miller & E.Cooper, *Federal Practice and Procedure*, Sec. 4426, p. 347. Moreover, the mere fact that a case falls within an exception to sec. 2283, does not "qualify in any way the principles of equity, comity, and federalism that must restrain a federal court when asked to enjoin a state court proceeding." *Mitchum v. Foster, supra.*

In this action, there was no showing of irreparable harm to the Exxon

defendants if they had to proceed in state court. Nor is it conceivable how defendants could suffer irreparable harm by the acts of plaintiffs. If any irreparable harm has been inflicted, it has been upon Madam Choo who has been denied her day in court for some seven years now, largely due to the procedural manueverings of Exxon. Exxon failed to show the absence of a remedy at law that would justify the injunction. To the contrary, the Exxon defendants need but raise in the state court proceeding their refined and previously filed motion for dismissal on grounds of forum non conveniens, supplemented by an argument of *res judicata* and *collateral estoppel.*

Fundamental principles of equity, comity and federalism also weigh heavily in favor of allowing plaintiffs to

finally proceed with their case on the merits. The unnecessary protraction of this litigation through procedural disputes and appeals should come to an end. Moreover, the fact that the federal court once refused to exercise jurisdiction strongly favors nonintervention by that same court in the state court action. In the recent case of ***Pennzoil v. Texaco***, 107 S.Ct. 1519 (1987), this Court once again warned against federal interference in state court actions. The Court stated that the federal courts, out of respect for comity, should generally "abstain" from involving themselves in state court proceedings. The Court observed that there is no reason why the state courts cannot resolve ***all*** issues which might come before them (even including federal issues), and this would seem to include

questions such as *res judicata*. The Court stated:

> The courts below should have abstained under the principles of federalism enunciated in *Younger v. Harris*, 401 U.S. 37 (1971). Both the District Court and the Court of Appeals failed to recognize the significant interests harmed by their unprecedented intrusion into the Texas judicial system. ***Similarly, neither of those courts applied the appropriate standard in determining whether adequate relief was available in the Texas courts.*** ....
> * * * * *
> As was stated in *Younger*:
> "This underlying reason ... is reinforced by an even more vital consideration, the notion of 'comity', that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, ***and a continuance of the belief that the National government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways*** .... The concept does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and national governments, and

in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* at 44.

....

* * * * *

So long as those challenges relate to pending state proceedings, ***proper respect for the ability of state courts to resolve federal questions presented in state court litigation mandates that the federal court stay its hand.***

* * * * *

Moreover, denigration of the procedural protections afforded by Texas law hardly come from Texaco with good grace, ***as it apparently made no effort under Texas law to secure the relief sought in this case.*** Cf. *Middlesex County Ethics Com. v. Garden State Bar Assn., supra*, at 435. ... Article VI of the United States Constitution declares that "the Judges in every State shall be bound" by the Federal Constitution, laws, and treaties. ***We cannot assume that state judges will interpret ambiguities in state procedural law to bar presentation of federal claims.*** .... Accordingly, when a litigant has not attempted to present his federal claims in related state court proceedings, a federal court should ***assume that state procedures will afford an adequate remedy, in the absence of unambiguous authority to the contrary.***

* * * * *

In sum, the lower courts should have deferred on principles of comity to the pending state proceedings.

107 S.Ct. at 1525, 1526, 1527, 1529; emphasis ours.

Indeed, as the Fifth Circuit put it, the state courts are fully capable of handling contentions regarding equitable estoppel and *res judicata* and, therfore, the principles discussed in *Pennzoil v. Texaco* apply with equal force to *res judicata* pleas in the state court:

> We take the view that a complainant must make a strong and unequivocal showing of relitigation of the same issue in order to overcome the federal courts' proper disinclination to intermeddle in state court proceedings. If we err, all is not lost. ***A state court is as well qualified as a federal court to protect a litigant by the doctines of res judicata and collateral estoppel.***

Southern California Petroleum Corp. v. Harper, 273 F.2d at 719.

Petitioners respectfully suggest that it would be in the interest of justice, uniformity and judicial stability for this Court to grant certiorari and, in the context of forum non conveniens determinations, make it clear that principles of equity, federalism, comity and abstention must be respected and given effect.

WHEREFORE, PREMISES CONSIDERED, your Petitioners pray the Court to grant the Writ of Certiorari in this case for all of the reasons stated above.

Respectfully submitted,

Benton Musslewhite
609 Fannin, Suite 517
Houston, Texas 77002
(713) 222-2288

Joseph C. Blanks, et al.
909 Laurel
Beaumont, Texas 77701

Attorneys for Petitioners

CERTIFICATE OF SERVICE

The undersigned, upon his oath and affirmation, hereby certifies that three true and correct copies of the foregoing Petition for Writ of Certiorari has been this day placed in the United States Mail, postage prepaid, and addressed to each counsel of record for all interested parties.

Benton Musslewhite

Benton Musslewhite

SWORN AND SUBSCRIBED TO BEFORE ME, on this 18th day of September 1987.

Notary Public in and for the State of Texas.

My commission expires 10/31, 1988

APPENDIX I

IN THE UNITED STATE DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

***

CIVIL ACTION NO. H-86-606

***

EXXON CORPORATION
AND ESSO TANKERS, INC.

versus

CHICK KAM CHOO, Individually and as Administratrix and/or Representative of the Estate of LEON CHONG, DECEASED, and as Next Friend of LEONG CHOY WAN, LEONG CHOY HUR, LEONG CHOY FONG and LEONG CHOY TAN, BENTON MUSSLEWHITE AND JOSEPH C. BLANKS

***

INJUNCTION AND FINAL JUDGMENT

The Motion for Summary Judgment and Application for Permanent Injunctive Relief of Exxon Corporation and Esso Tankers, Inc. for injunctive relief to enjoin Chick Kam Choo and her attorneys of record, Benton Musslewhite and Joseph

C. Blanks, Defendants, from any attempts to relitigate the issues finally determined in Civil Action No. H-78-477 in any pending or subsequent State Court proceeding having come on to be heard, and it appearing that the Defendants are attempting to relitigate issues previously decided by this Court in Civil Action No. H-78-477 in Cause No. 84-00125 in the 270th District Court for Harris County, Texas, and that such relitigation will cause irreparable damage to the Petitioners by requiring them to relitigate issues that have been finally decided and are now precluded it is

ORDERED that Chick Kam Choo and her attorneys, Benton Musslewhite and Joseph C. Blanks be and are hereby permanently enjoined from prosecuting or commencing any causes of action or claims against

Exxon Corporation and/or Esso Tankers, Inc. in the courts of the State of Texas or any other state, and in particular Cause No. 84-00125 pending in the 270th District Court of Harris County, Texas, arising out of or related to the alleged wrongful death of Leong Chong, which occurred onboard the Tanker ESSO WILHELMSHAVEN on or about March 24, 1977, in Singapore. This Injunctive Order is binding upon and applies with equal force to the Defendants, their agents, servants and upon those persons in active consent or participation with them.

Further ORDERED, that the Plaintiffs recover their reasonable attorneys' fees as subsequently determined by the Court along with their costs.

SIGNED at Houston, Texas, this 15th day of May, 1986.

/s/ Norman Black

United States District Judge

APPENDIX II

EXXON CORPORATION, et al.,
Plaintiffs-Appellees,

v.

CHICK KAM CHOO, et al.,
Defendants-Appellants.

No. 86-2428.

United States Court of Appeals,
Fifth Circuit

May 21, 1987.

(Reported at 817 F.2d 307)

Before CLARK, Chief Judge, GEE, and REAVLEY, Circuit Judges.

GEE, Circuit Judge:

This appeal presents a novel issue: whether the dismissal on *forum non conveniens* grounds of a maritime action by a federal court precludes litigation of the same claims in a state court located in the same city. We conclude that the *forum non conveniens* determination in federal court is binding in a

subsequent action between the same parties in the nearby state court.

A. Facts and Prior Proceedings

Appellant Choo's husband Leong Chang was shipwright. In 1977, he was killed in an accident while helping to repair a vessel docked in Singapore. Madam Choo sued the appellees, who are the owner and the operator of the vessel, in the Houston federal court for damages under the Jones Act, DOSHA, general maritime law, and the Texas wrongful death statute. The district court granted summary judgment on the merits of the Jones Act, DOSHA, and general maritime law claims, but granted the appellees only a conditional dismissal of the remaining claims because Houston was an

inconvenient forum.[1] Madam Choo failed to appeal, and the denial of her subsequent Rule 60(b) motion was affirmed in *Chick Kam Choo v. Exxon Corp.*, 699 F.2d 693 (5th Cir.) (*"Choo I"*), *cert denied*, 464 U.S. 826, 104 s.Ct. 98, 78 L.Ed.2d 103 (1983).

Madam Choo brought the same claims in a Texas state court in Houston[2] Exxon removed the case on diversity grounds to the federal district court, which

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1. Underlying that decision were subsidiary determinations that Singapore's would be the controlling law and that Singapore was the sit of the accident, was the residence of most of the plaintiffs and witnesses, and could prove an adequate forum.

2. At oral argument, appellants acknowledged that they had originally refiled an identical action including federal maritime claims in state court; they claim now to have voluntarily dismissed al but the state-law claims.

dismissed the case as *res judicata* and sanctioned Choo's lawyers. On appeal, our Court reversed the removal, holding that there was not complete diversity between the parties. *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148 (5th Cir.1985) (*"Choo II"*). The sanctions were dissolved and the case returned to state court. Exxon then brought this independent action seeking to enjoin the state court proceeding as an interference with the prior judgment of the federal court. The district court granted the injunction and again sanctioned Choo's attorneys. Choo appeals.

B. Jurisdiction and the Anti-Injunction Act

Madam Choo concedes on brief that jurisdiction is proper in this case if the district court was properly

enjoining the state litigation as *res judicata:*

> As a general rule, no independent basis of jurisdiction is needed for the court to entertain an aplicatio for injunction under the third exception [of the Anti-Injunction Statutes, 28 U.S.C. 2283, which allows injunctions of state court proceedings "to protect or effectuate" the federal court judgments]. The matter is considered to be ancillary, supported by the jurisdiction the court had when it entered the original judgment. *See Southwest Airlines Cv. Texas Int'l Airlines*, 546 F.2d 84 (5th Cir.), *cert denied*, 434 U.S. 832, 98 S.Ct. 117, 54 L.Ed.2d 93 (1977)] at 89-90, wherein the ancillary jurisdiction to support injunctive relief was supported by erlier action in which the district court *properly* asserted federal question jurisdiction.

Appellant's brief at 10 (emphasis in original). Therefore the only real isue in this case is whether the district court's dismissal of the first action bound all subsequent proceedings in the Houston courts.

As we understand the presentation of Madam Choo's lawyers, she advances three intertwined contentions to show that the Texas court is not bound. The first is that the federal district court's original conditional dismissal of her Texas wrongful death claim was a nullity because the court had dismissed all

federal claims and therefore lacked pendent jurisdiction over the Texas claim. The second is that a Texas state court may properly redetermine the identical *forum non conveniens* issue: whether Houston is a convenient forum for trial of this case from Singapore. the third is that Texas law does not recognize the doctrine of *forum non conveniens* in actions for personal injury or death and hence that the federal court's application of that doctrine is irrelevant to the state court proceeding. These arguments are not explicitly made in the alternative, but we will consider them in that fashion because they are logically disjoined.

Claims

Madam Choo contends that the district court was without power to dismiss her state-law claims. she does not dispute that the district court *intended* to dismiss the Texas claims on *forum non conveniens* grounds. In fact, the magistrate's recommendation in the initial round of litigation in the federal court explicitly included the Texas state claims in the recommendation for conditional *forum non conveniens* dismissal.[3] but because the district court dismissed all her claims under substantive federal law, she argues that the court thereby deprived itself of power to adjudicate her pendent claims, and its attempt to do so was a nullity.

The judgment of the district court sounds inconsistent in this respect. It

3. The magistrate recommended *forum non conveniens* dismissal of the claims remaining in the action in a section entitled "General Maritime Law, Texas Statutes, Other Claims and *Forum Non Conveniens*."

first dismissed all federal claims, including those under "the general maritime laws of the United States," on the merits. Then, it granted a motion for conditional *forum non conveniens* dismissal without specifying what claims were being dismissed on that ground.[4] As

4. The district court's Order of Dismissal reads:

> It is therefore ORDERED, ADJUDGED and DECREED that Defendnt's Motion for Summary Judgment is GRANTED as to Plaintiffs' claims under the Jones Act, the Death on the High Seas Act, the Longshoremen's and Harbor Worker's Compensation Act, *and the general maritime laws of the United States.*
>
> It is further ORDERED, ADJUDGED and DECREED that Defendants' Motion to dismiss under the doctrine of *forum non conveniens* is GRANTED, without prejudice, provided that Defendants Exxon Corporation and Esso Tankers, Inc., consent to the jurisdiction of the appropriate Singapore court, submit to service of process in such court, waive any defense related to any statute of limitations, and conent to satisfy any judgment rendered by said court.

(Emphasis added.) The relevant language in the magistrate's Memorandum and Recommendation is the same.

we have noted, the Texas claims were no doubt meant to be included in this conditional dismissal, but the court did not state which, if any, federal claims were conditionally dismissed.

A sufficient but incomplete resonse to this argument is that even if no federal admiralty claim remained in the case, the district court still retained pendent jurisdiction over the state claims. Dismissal of federal claims on the merits does not deprive a federal court of jurisdiction over state claims. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725, 86 S.Ct. 1130, 1138, 16 L.Ed.2d 218 (1966). Furthermore, even supposing the district court to have abused its discretion in dismissing the pendent state claim as *forum non conveniens*, that ruling was not appealed and thus,right or wrong in the abstract,

is binding on the parties as a practical matter. Courts are no longer sympathetic to the argument that judicial blunders void the jurisdiction or nullify the power of a court. *See Archie v. Christian*, 808 F.2d 1132 (5th Cir. 1987) (en banc)(lack of consent to a jury trial before a federal magistrate as required by statute does not undermine the district court's jurisdiction or nullify the judgment so as to warrant sua sponte reversal on appeal).

But we must reject for more fundamental reasons the contention that the district court was without jurisdiction to dispose of the state claims. The federal court sitting in admiralty is a court of plenary jurisdiction. Such a court is not deprived of jurisdiction by reason of the fact that neither federal statutory law nor general maritime law

provides the substantive law to resolve the matter before it. The *Lauritzen-Romero- Roditis*[5] doctrine applied by the district court is a maritime choice of law doctrine. When an admiralty court determines that foreign law applies, that is simplyone factor to be considered in *forum non conveniens* analysis. It is axiomatic that only a court with jurisdiction over the case can dismiss it as filed in a *forum non conveniens*.

In this case, the district court granted summary judgment on the claim that the substantive general maritime law of the United States governed the

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5. *Lauritzen v. Larsen*, 345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254 (1953); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 79 S.Ct. 468, 3 L.Ed.2d 368 (1959); *Hellenic Lines Limited v. Rhoditis*, 398 U.S. 306, 90 S.Ct. 1731, 26 L.Ed.2d 252 (1970).

action; but it implicitly acknowledged that the plaintiffs - survivors of a ship repairman killed on an operational vessel in navigable waters - have admiralty tort claims. *See Kelly v. Smith*, 485 F.2d 520, 523-26 (5th Cir.1973) (setting out test for admiralty jurisdiction), *cert denied sub nom. Chicot Land Co. v. Kelly*, 416 U.S. 969, 94 S.Ct. 1991, 40 L.Ed.2d 558 (1974); *cf. Cormier v. Oceanic Contractors, Inc.*, 696 F.2d 1112, 1113 (5th Cir.) (welder injured while working aboard a barge moored for loading in Dubai, United Arab Emirates, is a *Sieracki* seaman[6] entitled to bring an unseaworthiness claim under the general

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6. *Sea Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946)(harbor workers undertaking traditional tasks and risks of seamen can sue shipowner for unseaworthiness).

maritime law), *cert. denied*, 464 U.S. 821, 104 S.Ct. 85, 78 L.Ed.2d 94 (1983). The court simply declined to exercise its undoubted admiralty jurisdiction over claims by Singapore plaintiffs on an alleged tort in Singapore to which the substantive law of Singapore should be applied. Therefore, the conditional dismissal included maritime tort claims and the federal court necessarily had jurisdiction to dispose of pendent state claims.

We have established that Madam Choo's claims under Texas law were conditionally dismissed as *forum non conveniens* in the first round of litigation by a court with power to do so. We now squarely face Choo's alternative argument: A Texas state court may nevertheless redetermine whether *forum non conveniens* applies to a case

previously dismissed on that ground in a federal court a few blocks away. This poses issues both important and novel, to which we now turn.

D. The Effect of the Forum Non Conveniens *Dismissal*

Federal courts have permitted relitigation of the *forum non conveniens* issue in a different federal forum when the plaintiff has demonstrated different contacts between the new forum and the underlying dispute. In *Mizokami Bothers of Arizona v. Mobay Chemical Corp.*, 660 F.2d 712, 716 (6th Cir.1981), an Arizona district court had dismissed a dispute between international parties on *forum non conveniens* grounds. The Sixth Circuit held that the plaintiff could relitigate the *forum non conveniens* issue in a Missouri district court.

> Appellant here has contended that the contacts of the parties with Missouri, the availability of witnesses in Missouri and other relevant factors make the inquiry distinct. We believe the record demonstrates sufficient differences in the underlying facts that consideration of the convenience of a Missouri forum is not forclosed.

660 F.2d at 716. The *Mizokami* court distinguished *Pastewka v. Texaco, Inc.*, 565 F.2d 851 (3d Cir.1977). In *Pastewka*, the Third Circuit held that a *forum non conveniens* determination in a New York federal district court was *res judicata* as to a Delaware federal district court when the underlying dispute involved a maritime collision twelve miles off the coast of England:

> The appellants point to no objective fact establishing that, unlike New York, Delaware would be a more convenient forum than England or that Delaware would be even as convenient as New York. Indeed, it appears that the only reason Delaware was resorted to was that under 28 U.S.C. 1332(c) Texaco, Inc., a Delaware corporation,

may be sued there.

565 F.2d at 853.

Madam Cho's presentatin to us does not point to any "underlying facts," *Mizokami*, 660 F.2d at 716, or "objective fact," *Pastewka*, 565 F.2d at 853, that make a Texas court in Houston a more convenient forum for this litigation than a United States District Court in Houston. We therefore contemplate a more extreme situation than that dealt with in *Pastewka*: there the localities dealt with were England (site of accident), New York (forum first found inconvenient), and Delaware (second forum, precluded by first determination). Here the corresponding ones are: Singapore, Houston (federal court), and Houston (state court). There can be no doubt that there is but one issue, an

issue that has already once been decided by the federal district court. While that decision was probably correct, what signifies is that Cho did not appeal from it so its propriety is not even before us. The only question before us is whether the *forum non conveniens* issue itself is the same in Houston federal and state trial courts. Madam Choo has alleged no facts relevant to *forum non conveniens* that could lead us to conclude that a state court is a more convenient forum.

There is, to be sure, little authority on the point. Other than *Mizokami* and *Pastewka*, discussed above, Professor Wright cites only *Domingo v. States Marine Lines*, 340 F.Supp. 811 (S.D.N.Y.1972), and *Anastasiadis v. Mecom*, 265 F.Supp. 959 (S.D.Tex.1966). *Domingo* is arguably in Madam Choo's

favor; we discuss it below. In *Anastasiadis*, our brother Ingraham, then on the district bench, dismissed an attempted *in personam* action against the beneficial owner of a vessel on grounds of direct estoppel because a former action in rem against the vessel had been dismissed on a fiding that the courts of Greece were its proper forum. Professor Wright concludes:

> Dismissal on *forum non conveniens* grounds does not establish claim preclusion; ordinarily it cannot work issue preclusion as to other courts because the convenience issues are intrinsically different, *but issue preclusion is appropriate if the issue actually remains the same.*

18 C.Wright, A.Miller & E.Cooper, *Federal Practice and Procedure: Jurisdiction* Sect 4436, at 346 (1981) (emphasis added; footnotes omitted). Here the issue *does* remain the same: a state court in Houston is as convenient

or inconvenient a forum for trial of a case from Singapore as a federal court in Houston.

The species of *res judicata* with which we deal today is known as direct estoppel. Judge Gibbons, writing for the Third Circuit in *Pastewka*, states the doctrine clearly:

> The appellants concede, as they must, that had the New York judgment, now final, beenon the merits, *res judicata* would bar the Delaware action. But they urge that the policy underlying *res judicata* does not apply to matters in abatement which may involve the exercise of discretion. A nonmerits judgment following a plea in abatement, however, does create a direct estoppel as to matters which were actually adjudicated. This is made clear in the Restatement of Judgments 49, Comment b (1942)....

Pastewka, 565 F.2d at 853.[7]

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7. The passage from the Restatement to which Judge Gibbons refers reads:

> *b. Effect of judgment as to issues decided.* Although, where the judgment

In response to this sparse but persuasive authority, Madam Choo's attorneys cite only *Parsons v. Chesapeake & Ohio Railway Co.*, 375 U.S. 71, 84 S.Ct. 185, 11 L.Ed.2d 137 (1963)

for the defendant is not on the merits, the plaintiff is not precluded from maintaining a new action on the same cause of action, he is precluded from relitigating the very question which was litigated inhe prior action. Thus, if the action was dismissed because of the nonjoinder of a third person as defendant, and the plaintiff thereafter brings an action on the same cause of action without joining the third person, the plaintiff is not entitled again to litigate the question whether the third person was a necessary party.

This is an instance of direct estoppel rather than collateral estoppel (See sect. 68), since the second action is based upon the original cause of action (see Sect 45(c) and Comment d thereon). The matter actually litigated and determined is *res judicata* between the parties in a subsequent action involving the same matter, whether the subsequent action is based upon the same or a different cause of action.

Restatement (First) of Judgments Sect. 49 comment b (1942); *see also* Restatement (Second) of Judgments Sect. 20 comment b (1982).

(per curiam). *Parsons* held that a state court *forum non conveniens* dismissal is not *res judicata* in a federal court applying 28 U.s.C. Sect. 1404(a), the statutory change-of-venue analogue of *forum non conveniens*. We agree with Judge Gibbons that *Parsons* is not inconsistent with the direct estoppel by judgment rule. *Pastewka*, 565 F.2d at 854. First, *Parsons* points out various considerations material to a state court's *forum non conveniens* analysis that will almost always differ from those informing a federal court's Sect. 1404(a) analysis. For example, the Illinois state court had dismissed the action after finding that the Michigan town where the plaintiff's injury allegedly occurred was the proper forum. The Supreme Court pointed out that there was no federal court in that town; the

nearest was 60 miles away. That alone would be a materially different "objective fact" under the standard we announce today. Second, the Supreme Court has recently affirmed explicitly what is implicit in *Parsons*: Sect. 1404(a) is not a codification of the common law doctrine of *forum non conveniens*. Although *forum non conveniens* analysis is similar, the federal district court has more discretion under the statute than under the common law doctrine. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 253, 102 S.Ct. 252, 264, 70 L.Ed.2d 419 (1981). Therefore, issue preclusion is less appropriate in the *Parsons* context.

Our research has uncovered one case that is superficially favorable to Madam Choo. In *Domingo v. States Marine Lines*, 340 F.Supp. 811 (S. D. N. Y. 1972), the

court dismissed an action by brought against an United States shipowner by Phillipine citizens. The U.S. Ship had collided with and sunk a Phillipine ship in Manila harbor. Many of the plaintiffs had filed the same suit in Delaware and in an earlier suit in the New York State courts. The New York state courts had dismissed the suit as *forum non conveniens*, but the Delaware courts had denied a *forum non conveniens* motion to dismiss. The plaintiffs argued that (only) the Delaware decision was *res judicata*. The federal court disagreed:

> The decision of [the Delaware courts] is not in any way determinative of the issues now before me. These decisions are not *res judicata*, as plaintiff argues, and would not be even if they had been made by the courts of New York, rather than Delaware. *See Parsons v. Chesapeake & Ohio Ry. Co.* Nor do I consider them in any way binding upon me. [Footnote:] It will be remembered that the New York Courts have already decided the question the other way

by dismissing one of the actions.... 340 F.Sup. at 817 & n.6 (part of citation omitted). The thrust of this passage is clearly contrary to the authority we have reviewed thus far. But we are comfortable distinguishing *Domingo* on several grounds. First, the district court spent a large part of its analysis expressing concern about its overcrowded docket. 340 F.Supp. at 816. This is the kind of "objective fact" that can undermine an assertion that a prior determination of *forum non conveniens* is *res judicata* in anew forum. Madam Choo, for example, has not alleged differing docket conditions in the federal and state courts in Houston. Second, the court was hardly presented with a compelling case for direct estoppel: the Delaware courts had decided in favor of the plaintiffs and

the New York courts had decided in favor of the defendant on the precise issue presented to the federal court. Finally, the federal district court was sitting in admiralty. As we elaborate below, the special requirement of federal supremacy in matters maritime may justify the district court's refusal to follow decisions made under state notions of *forum non conveniens*.

We conclude that once a court of competent jurisdiction has squarely passed on an issue fairly mooted between the same parties, on the merits of the cause or otherwise, that issue may not be relitigated. In the case of *forum non conveniens*, the plaintiff in the new forum must do more than ask for a rebalancing of *forum non conveniens* considerations. He must show objective facts relevant to the issue that mater-

ially alter the considerations underlying the previous resolution. Here, n the ordinary case, our inquiry would be complete. Texas law presents a further peculiarity, however, one that drives us to consider larger matters indeed.

E. The Texas "Open Forum" Law

Faced with the above, Madam Choo's counsel responds somewhat as follows: "Supposing that the Texas forum is indeed an inconvenient one, and supposing further that the federal court's decision that it is inconvenient would ordinarily settle that matter for state court purposes as well, what prevents a state from throwing open its doors so as to become courthouse to the world? from hearing all cases from anywhere, regardless of how convenient

or inconvenient to court, witnesses, or parties?" "And in fact," he continues, "that is exactly what Texas had done for cases involving personal injury and wrongful death." The contention is not fanciful: Since early in this century, Texas has maintained a statute in more or less the form of the present Vernon's Civil Practice and Remedies Code Sect. 71.031:

> Sect. 71.031. Act or Omission Out of State
>
> (a) An Action for damages for the death or personal injury of a citizenof this state, of the United States, or of a foreign country may be enforced in the courts of this state, although the wrongful act, neglect, or default causing the death or injury takes place in a foreign state or country, if:
>
> (1) a law of the foreign state or country or of this state gives a right to maintain an action for damages for the death or injury;
>
> (2) the action is begun in this state within the time provided by the laws of this state for

beginning the action; and

(3) in the case of a citizen of a foreign country, the country has equal treaty rights with the United States on behalf of its citizens.

(b) All matters pertaining to procedure in the prosecution or maintenance of the action in the courts of this state are governed by the law of this state.

(c) The court shall apply the rules of substantive law that are appropriate under the facts of the case.

Tex.Civ.Prac. & Rem.Code Sect. 71.031 (Vernon 1986).

No one can say whether Texas courts will place upon this statute the construction for which Madam Choo contends: that Texas has constituted itself the world's forum of final resort, where suit for personal injury or death may always be filed if nowhere

else.[8] The Texas Supreme Court has, however, as recently as December 1984 reaffirmed its longstanding view that, although the question is an open one, this may in fact have been the Texas Legislature's intent.

The opinion to which we refer is *Couch v. Chevron International Co.*, 682 S.W.2d 534 (Tex.1984); one that is the more striking by reason of its procedural setting, as we explain in the

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8. Acquiring personal jurisdiction over some defendants may, of course, present practical difficulties; and at some point considerations of due process are doubtless implicated when a defendant is required to stand trial at the opposite end of the earth from the location of witnesses, site of the accident, etc. Legislature's intent.

margin.[9] There the Texas Court declined review of a judgment for defendant in a Jones Act case strikingly similar to this, one brought to Texas from the offshore oil fields of the North Sea on behalf of Scottish plaintiffs by one of counsel in today's case. After losing a

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9. The Texas Supreme Court, the state's highest civil legal authority, exercises a chiefly discretionary power of review. Unlike the United States Supreme Court, which regularly and unavailingly exhorts those who follow its proceedings to refrain from drawing inferences from its actions denying certiorari, the Texas Court responds to petitions for writ of error with orders of denial which are and are intended to be informative. One such notation is "no reversible error," which indicates approval of the judgment but not of its reasoning. In recent times, that court has adopted a practice of writing on infrequent occasions to explain its reasons for declining to adopt the reasoning of an opinion although approving its outcome. The opinion cited is one whch the Texas Court determined was on an issue sufficiently significant to merit such treatment.

motion to dismiss for *forum non conveniens* in the trial court, the plaintiffs had moved for a new trial onthe ground that they were also asserting a claim under Tex.Rev.Civ. Stat.Ann. art. 4678 (Vernon Supp.1984), the preceding codification of Sect. 71.031 quoted above. The trial court denied the motion on the theory that the plaintiffs had waived by delay the right to invoke article 4678. The Texas court of appeals affirmed on the ground that *forum non conveniens* dismissal was appropriate despite the invocation of article 4678. *Couch v. Chevron International Oil Co.*, 672 S.W.2d 16 (Tex.App.-Houston [14th Dist.] 1984). The court of appeals reasoned that, because this was a Jones Act case, federal maritime law applied, and, assuming them to be inconsistent, the

federal *forum non conveniens* doctrine preempted the statute. The Supreme Court affirmed the judgment. Lest there be any doubt about its reasons for doing so, however, it was at pains to explain that waiver, not *forum non conveniens*, was the basis:

> Responding to the plaintiff's appeal, the defendants urged: (1) that the plaintiffs' failure to timely plead for relief under article 4678 served to waive any right to recover under that statute; and (2) even if plaintiffs properly pleaded an article 4678 cause of action, the doctrine of *forum non conveniens* still would require a dismissal of this cause. In affirming the trial court, the court of appeals chose not to base its decision on the plaintiffs' waiver of the article 4678 cause of action. 672 S.W.2d 16. Rather, the court sustained the defendants' alternative argument that, even if the article 4678 cause of action were pleaded properly, the dismissal for *forum non conveniens* still was correct. *Id.* at 18.
>
> We refused this writ application, finding no reversible error, because we agreed that the plaintiffs waived their article 4678 cause of action. The court of appeals opinion, however, does not mention this waiver. Although the court of appeals reached the correct decision, that part of its opinion pertaining to article 4678 and *forum non conveniens* is dicta. Thus, the applicability of *forum non conveniens* to an article 4678 cause of action is an open question. *Flaiz v. Moore*, 359 S.W.2d 872, 876 (Tex.1962). Consequently, for the reasons stated, we overrule petitioners' motion for rehearing on the application for writ of error.

Couch, 682 S.W.2d at 535. If *Couch* left any doubt that the Texas Supreme Court holds strong views on the technically "open question" of the applicability of *forum non conveniens* to an action under Sect. 71.031, that doubt was all but laid to rest the following year. In *McNutt v. Teledyne Industries, Inc.*, 693 s.W.2d 666 (Tex.App.-Dallas 1985), another court of appeals, pointing to the phrase "may be enforced" in the statute, ruled that Texas courts have discretion to allow or not to allow an action under Sect. 71.031, and that the

trial court had not abused its discretion in granting a *forum non conveniens* dismissal. The Texas Supreme Court promptly granted a writ of error, 29 Tex.Sup.Ct.J. 66 (1985), vacating the judgment as moot in December 1985 after the parties settled. The actions of the Texas Court in *Couch* and *McNutt* make clear the substantial likelihood that it will decline to acknowledge the doctrine of *forum non conveniens* even in a maritime case governed by federal law. Indeed, *Couch* was such a case.

Madam Choo contends that the existence of Sect. 71.031 precludes *forum non conveniens* analysis in a personal injury or death case filed in a Texas state court; and, given the broad hints thus far dropped by the Texas Supreme Court, it is hard to disagree that this may be its view of the statute. From this pre-

mise, she concludes that a *forum non conveniens* dismissal of such an action by a federal court cannot be *res judicata* in a Texas state court because Sect. 71.031 creates a potentally dispositive legal issue that ha not yet been fully and finally litigated between the parties. Again, as a general matter, we can find no fault with her logic: When a federal court and a Texas state court have concurrent and *independent* jurisdiction over a personal injury or death action, in the end Sect. 71.031 may well be construed by the Texas Supreme Court to preclude direct estoppel in the state courts by a *forum non conveniens* dismissal in the federal courts.

But this is a maritime case; it does not involve independent actions in the state and federal courts. The state

court's jurisdiction is derivative; and it is bound to apply the general maritime law of the United States - a jurisprudence of which federal courts are the custodians, as Texas courts are of Texas law.

F. The Uniformity Doctrine and the Supremacy of Maritime Law

Within its sphere of operation, the maritime law of the United States is supreme; and the states are without power to disrupt it:

> [T]he "saving to suitors" clause [now codified at 28 U.S.C. Sect. 1333] allows state courts to entertain *in personam* maritime causes of action, but in such cases the extent to which state law may be used to remedy maritime injuries is constrained by a so-called "reverse-Erie" doctrine which requires that the substantive remedies afforded by the States conform to governing federal maritime standards.

Offshore Logistics, Inc. v. Tallentire, 106 S.Ct. 2485, 2495, 91 L.Ed.2d 174

(1986). The Supreme Court laid the foundation of this doctrine in a series of cases 70 years ago. *See Southern Pacific Co. v. Jensen*, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086 (1917); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 38 S.Ct. 501, 62 L.Ed. 1171 (1918); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834 (1920). although the broad pronouncements of those early cases have been often hedged and qualified, *see, e.g., Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 373-75, 79 S.Ct. 468,

480-81, 3 L.Ed.2d 368 (1959), their core meaning is indisputable. "If there is any sense at all in making maritime law a federal subject, then there must be some limit set to the power of the states to interfer in the field of its working." G. Gilmore & C. Black, *The Law of Admiralty* Sect. 1-17, at 48 (2d ed. 1975).

Like other questions arising under the Supremacy Clause, questions of federal preemption in the maritime context admit of no simple answers. We must turn to precedent for assistance in

determining when maritime law preempts inconsistent state laws.

1. The Relation Between Maritime Law and State Law

The preemption test in the maritime field is usually stated something like this: "Although state law may supplement maritime law where maritime law is silent, or where a local matter is at issue, state law may not be applied where it would conflict with maritime law." *Coastal Iron Works, Inc. v. Petty Ray Geophysical*, 783 F.2d 577, 582 (5th Cir. 1986)(citations omitted). This test is not very helpful in today's case; the state law under scrutiny is plainly inconsistent with maritime law, and the questin is whether the type or degree of inconsistency is objectionable. A better definition for present purposes appears

in an earlier decision of our Court:

> Although state law may occasionally be utilized to fill the gaps in an incomplete and less than perfect maritime system it cannot be employed to contravene an act of congress, to prejudice the characteristic features of the maritime law or to disrupt the harmony it strives to bring to international and interstate relations.

J. Ray McDermott & Co. v. The Vessel Morning Star, 457 F.2d 815, 818 (5th Cir.)(en banc)(Ship Mortgage Act need not be supplemented by state law), *cert denied*, 409 U.S. 948, 93 s.Ct. 271, 34 L.Ed.2d 219 (1972). This test contains several concrete ideas. First, state law can be used to "fill the gaps" of maritime law; the implication is that the state law provides detailed distinctions that are absent from and of little or no concern to maritime law. Second, state law is less likely to be used to supplement maritime legislation.

The idea here is partly that Congress is supreme in matters maritime and partly that legislation is more likely than judge-made law to be complete and self-sufficient. *Cf. Mobile Oil corp. v. Higginbotham*, 436 U.S. 618, 98 S.Ct. 2010, 56 L.Ed.2d 581 (1978)(DOSHA may not be supplemented by judge-made recovery rules). Consequently, any inconsistent state law is likely to conflict with statutory maritime law - to be inconsistent in the preemptive sense. Third, state law inconsistent with the "characteristic features" of the maritime law is preempted in an admiralty case. Finally, as in other areas of federal preemption, state law is preempted by maritime law if it affects international or interstate relations. With the aid of this definition and our own research in the

cases, we have indentified five factors - more accurately, five concepts or clusters of ideas - that inform maritime preemption analysis. The first and second factors cut toward the application of state law, the fourth and third toward preempton, and the fifth cuts in both directions indiscriminately.

The first factor is that state law is not preempted when it contains a detailed scheme to fill a gap in maritime law. In *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955), for example, the Supreme Court noted that there was no federal admiralty law to govern the application of terms and warranties in a marine insurance contract. The Court decided that the maritime court should apply state law

instead of creating a uniform maritime law of insurance contracts. Although this decision has been criticized by commentators, *se, e.g.*, Gilmore & Black, Sect. 1-17, at 48-49, the Supreme Court reasonably believed that more uncertainty would result from the case-by-case creation from whole cloth of a federal maritime insurance law than from the application of a variety of already well-developed state laws. 348 U.S. at 319, 75 S.Ct. at 373.

The second factor is that state law is not preempted when the law regulates behavior in which the state has an especially strong interest. The venerable phrase "police power" is often used to express this overriding interest in self-regulation. *See, e.g., Askew v. American Waterways Operators*, 411 U.S. 325, 93 S.Ct. 1590, 36 L.Ed.2d 280

(1972)(Florida oil spill regulations); *Wilburn Boat co. v. Fireman's Fund Insurance Co.*, 34 U.S. at 316-19, 75 S.Ct. at 371-73 (traditional and plenary state power to regulate all forms of insurance). The "maritime but local" idea is a corollary; the state interest, whatever its magnitude, is viewed as greater than any maritime concern. See, e.g., *Grant-Smith-Porter Ship co. v. Rohde*, 257 U.S. 469, 42 S.Ct. 157, 66 L.Ed.2d 321 (1922)(carpenter injured while building ship on navigable waters cannot bring action in admiralty but is restricted to state workman's compensation); *cf. Kamani v. Port of Houston Authority*, 702 F.2d 612, 614 (5th Cir.1983)(action by longshoreman working aboard ship; remand question whether state or maritime statute of limitations should apply to maritime

action brought against state under the Texas Tort Claims Act).

The third factor is that maritime law preempts whenever a uniform rule will facilitate maritime commerce, or, conversely, when non-uniform regulation will work a material disadvantage to commecial actors. This notion is sometimes simply referred to as the need for uniformity, but uniformity is obviously not an end in itself or else state law would *always* be preempted. A corollary of this concept is the notion found in the *J. Ray McDermott & Co.* test of "characteristic features" or core principles of the maritime law. 457 F.2d at 818. Applying state law inconsistent with "characteristic features" would defeat the reasonably settled expectations of maritime actors. The most striking example of the importance

of uniformity is *Moragne v. States Marine Lines*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed.2d 339 (1970)(overruling one hured-year-old precedent to create a uniform maritime action for wrongful death in territorial waters).[10] Since uniformity is related to predictability and to reasonable legal expectations, it is of greatest importance when legal relations are not predictably related to a certain locale and its laws. The *Moragne* Court ridiculed the fluctuating rights and responsiblities of shipowners

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10. *Moragne* can also be viewed as the last in a series of Supreme Court decisions driven by the final factor: maritime plaintiffs should win. *See* Gilmore & Black, Sect 6-61, at 465-66.

and crew under the *Harrisburg-Tungus*[11] *regime as a ship sailed blithely through waters covered by DOSHA, territorial waters of states that gave wrongful death remedies, and waters of states that did not. Compare this to the Wilborn Boat* maritime insurance contract made in Texas, covering a boat on the inland waters of Texas, with an eventual suit on the contract in Texas state court, removed to federal.

The fourth factor is that maritime law preempts state law when the state law impinges on international or interstate relations. This concept is so basic to federal maritime jurisdiction that we find only generalized statements and no disputes about it in the cases.

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11. The *Tungus v. Skovgaard*, 358 U.S. 588, 79 S.Ct. 503, 3 L.Ed.2d 524(1959) (state laws giving action for wrongful death on territorial waters can be enforced in admiralty); *The Harrisburg*, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358 (1886)(by analogy to common law, no maritime action for wrongful death).

But there are powerful analogies in other areas of preemption doctrine that reflect the sovereign power of the fedeal government to regulate foreign relations and relations between the states. For example, state regulation of both resident and nonresident aliens is frequently held preempted by federal law even when the state law is not inconsistent with any particular federal law. *See, e.g., Toll v. Moreno*, 458 U.S. 1, 102 s.Ct. 2977, 73 L.Ed.2d 563 (1982) (state university may not charge resident aliens out-of-state tuition even though aliens are exempt from state taxation by federal law); *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)(state restrictions on welfare benefits available to resident aliens preempted by fedeal authority to regulate immigration). And

this is so regardless of the fact that traditional areas of state regulation and powerful state interests are involved. *See Zschernig v. Miller*, 389 U.s. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968)(Oregon inheritance statute requiring state judicial inquiry into relation between non-resident aliens and their country of domicile is an invalid intrusion by the state into foreign affairs). Matters of import to foreign relatons are inherently matters of uniquely fedeal competence. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425, 84 S.Ct. 923, 939, 11 L.Ed.2d 804 (1964)(federal "act of state" doctrine applied in a diversity case: "ordering our relationships with other members of the international community must be treated exclusive as an aspect of federal law").

The final factor, stated baldly, is that plaintiffs should win personal injury or death maritime tort claims. This concept points indiscriminately toward state or federal law depending on the case. It was one important technique used by the Supreme Court and lower courts during the 1950s and 1960s to keep admiralty law in line with the land-side revolution in tort law. *See* Gilmore & Black, Sect 6-61, at 463-68. Instead of constantly liberalizing maritime law, the federal courts would allow state law to control if the result was favorable to the plaintiff. presently, this thumb-on-the-scales concept is on the decline in maritime

law.[12] The old revolution is now fixed as the new orthodoxy; and we have begun to doubt both the wisdom of further change and our institutional competency to undertake it. *See State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1032-34 (5th Cir.1985)(en banc) (Gee, J., concurring), *cert denied*, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986). We do not consider it in our analysis below.

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12. *See, e.g., Branch v. Schumann*, 445 F.2d 175, 178 (5th Cir.1971)(Florida may not impose higher standard of care on owner-operator of a motorboat than the "reasonableness" standard of general maritime law); *cf. Byrd v. Byrd*, 657 F.2d 615, 617-18 (4th Cir. 1981) (admiralty court should not apply Virginia inter-spousal immunity doctrine; trend is away from this immunity; state law should not be applied "where its application would defeat an otherwise meritorious cause of action")(citing cases).

2. Forum Non Conveniens *and State Law*

The next question is whether under these standards Sect. 71.031, the Texas "open-forum" law, is preempted by maritime *forum non conveniens* doctrine in a maritime case brought by a non-resident alien. But first we face one twist. The traditional view of concurrent state jurisdiction over maritime matters under the "saving to suitors" clause is that states are free to apply their own common law "remedies" as long as substantive maritime law governs. *See Chelentis*, 247 U.S. at 382, 38 S.Ct. at 504 ("The distinction between rights and remedies is fundamental."); *cf. Offshore Logistics*, 106 S.Ct. at 2495 (states' "substantive remedies" must conform to maritime standards). It has been universally and

correctly assumed that state procedural rules govern actions in state courts under the "saving to suitors" clause - the "reverse-*Erie*" metaphor captures this assumption perfectly. Some courts have held that *forum non conveniens* is "procedural" for *Erie* purposes. *See, e.g., Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.1985), *cert denied*, 106 S.Ct. 347, 88 L.Ed.2d 294 (1986). Therefore, if the "reverse-*Erie*" doctrine is perfectly symmetrical, it follows that state courts are not obligated to apply federal *forum non conveniens* analysis in maritime cases.

We reject this facile syllogism; drawing conclusions from metaphors is dangerous. The reason that state court procedures are not preempted by maritime law is that they almost never - before this case we might rashly have said

"never" - conflict with it. When they do, however, it is clear that they must yield. Among several examples of this rule that might be cited is *Garrett v. Moore-McCormick Co.*, 317 U.s. 239, 63 S.Ct. 246, 87 L.Ed. 239 (1942). In that case an injured seaman, having first released his claim, later brought a Jones Act suit on it in the state courts of Pennsylvania. The state court, applying its rule that one who attacks the validity of a written release has the burden of proof - and a heavy one at that - gave judgment for the defendant despite a jury verdict favorable to the seaman. On resort to it, the Pennsylvania Supreme Court drew precisely the substance/procedure line, concluding that "the rule as to burden of proof on releases does not affect the substantive rights of the parties, but

is merely procedural, and is therefore controlled by state law." 317 U.S. at 242, 63 S.Ct. at 249. Speaking through Justice Black, a unanimous Supreme Court drew precisely the substance/procedure line, concluding that "the rule as to burden of proof on releases does not affect the substantive rights of the parties, but is merely procedural, and is therefore controlled by state law." 317 U.S. at 242, 63 S.Ct. at 249. Speaking through Justice Black, a unanimous Supreme Court reversed and directed that the more lenient (to the seaman) federal procedural rule must be applied: that in establishing the validity of a seaman's release the burden of proof - and a heavy one at that - is on the person who relies on it.

Because the *Erie* diversity doctrine

and the "reverse-*Erie*" maritime doctrine spring from distinct principles and policies, there is no reason to expect a perfect symmetry between them. In the *Erie* context, the substance/procedure dichotomy is simply shorthand for distinctions that must be drawn on the basis of policies underlying the doctrine.[13] The "reverse-*Erie*" question is whether the inconsistent state law, whether deemed a matter of substance or procedure, conflicts with maritime law. Therefore, the question of the effect on Sect. 71.031 remains, and we must analyze it under the framework set out above.

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13. For example, federal courts sometimes follow state "procedural" rules in diversity cases. *See, e.g., Conway v. Chemical Leaman Lines, Inc.*, 540 f.2d 837 (5th Cir. 1976)(applying Texas evidence rule that evidence of widow's ceremonial remarriage is admissible in wrongful death action).

It is obviious from the factors which we have outlined that Sect. 71.031 loses on all counts. Federal *forum non conveniens* analysis must preempt Sect. 71.031 in a maritime suit by an alien in Texas courts. The first factor - using state law to fill gaps - is inapplicable at best. This factor actually cuts towards federal law because *forum non conveniens* is well-articulated federal doctrine while the meaning of Sect. 71.031 is not yet settled. The second factor - "police power" or "maritime but local" state interests - gives the state law little support in this context. Whie Texas has an undeniably powerful interest in defining the jurisdicti of its courts, its interest in the substance of claims by non-resident aliens arising from activities in foreign lands cannot be considered

strong. By its terms, the statute applies only to a "wrongful act, neglect, or default causing the death or injury [when it] *takes place in a foreign state or country.*" Sect 71.031 (a) (emphasis added). This conclusion is reinforced by the circumstance that the defendant in a maritime claim involving Sect. 71.031 need not reside in Texas. In the context of international maritime commerce, the defendants are just as likely to be aliens as are the plaintiffs.

The third factor - uniformity and predictability of maritime law - points forcefully toward preemption. *Forum non conveniens* is a "characteristic feature" of maritime law. The doctrine has its roots inthe maritime law, *see generally* Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal*

Courts in Matters of Admiralty, 35 Cornell L.Rev. 12 (1949), and appeared in maritime cases in the federal courts shortly after their birth. *See Mason v. The Ship Blaireau*, 6 U.S. (2 Cranch) 240, 264, 2 L.Ed. 266 (1804).[14] When

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14. In this case, a preliminary question has been made by the counsel for the plaintiffs, which ought not to be disregarded. As the parties interested, except for the owners of the cargo of the Firm, are not Americans, a doubt has been suggested respecting the jurisdiction of the court, and upon a reference to the authorities, the point does not appear to have been ever settled. These doubts seem rather founded on the idea, that upon principles of general policy, this court ought not to take cognizance of a case entirely between foreigners, than from any positive incapacity to do so. On weighing the considerations drawn from public convenience, those in favor of the jurisdiction appear much to overblance those against it, and it is the opinion of this court, that, whatever doubts may exist in a case where the jurisdiction may be objecte to, there ought to be none, where the parties assent to it. 6 U.S. (2 Cranch) at 264 (Marshall, C.J.).

the Supreme Court first introduced *forum non conveniens* analysis into the mainstream of federal jurisprudence, the dissenters argued that the doctrine should be confined to the admiralty and equity courts from whence it came. *See Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 513-15, 67 S.Ct. 839, 845-46, 91 L.Ed. 1055 (1947)(Black, J., dissenting). As we elaborate below, the need for uniform application of the doctrine by all courts in the United States is particularly acute because of the transnational and international nature of the interests at stake in a *forum non conveniens* inquiry. Even standing alone, these theoretical considerations might lead us to conclude that any state law inconsistent with the doctrine should be preempted; but there are powerful practical reasons as well.

If the Texas courts interpret Sect. 71.031 to require them to take jurisdiction over cases to which it applies, maritime actors throughout the world will be subject to suit in the state courts of Texas on claims arising around the world as long as they have sufficient contacts here for personal jurisdiction to be had. They will be available for suit even if they are aliens, the plaintiffs are aliens, and the transaction complained of by the plaintiff has no relation whatever either to Texas or to the United States. furthermore, if such a Sect. 71.031 case can be removed to the district court, then federal *forum non conveniens* may be applied and the case dismissed. *See, e.g., Sibaja v. Dow Chemical Co.*, 757 F.2d at 1219. thus crucial aspects of the outcome of the litigation will turn

on the fortuities of diversity. To make matters worse, the holding of our Court in an earlier phase of this litigation means that actions between an alien plaintiff and an alien defendant in the courts of Texas will not be removable while those involving an alien plaintiff and a United States defendant undoubtedly will be removed and often dismissed for *forum non conveniens*. *See Choo II*, 764 F.2d at 1152 (no diversity jurisdiction in suit between aliens). If Sect. 71.031 is interpreted as Madam Choo urges, its general effect will be the random, unpredictable availability of Texas courts to foreign plaintiffs depending on the requirements of the statute and the contacts of the defendants with Texas. The non-removability of Jones Act claims is one more significant variable in this bizarre

jurisdictional equation. Add in the ability of *domestic* defendants - but alien defendants - to remove non-Jones Act cases to federal court and have the action dismissed, and the effect of Sect. 71.031 becomes positively irrational. We cannot tolerate this pointless intrusionon the basic uniformity of the maritime law.

G. Federal Forum Non Conveniens: *Balancing Private Interests and International Effects*

Federal law controls the international role of all courts in the United States. *See Zschering v. Miller*, 389 U.S. 429, 436, 88 S.Ct. 664, 668, 19 L.Ed.2d 683 (1968)(state court inquiries into the internal affairs of foreign nations intrude on exclusive federal power over foreign affairs and international relations and are unconstitutional under

the Supremacy Clause). In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), for example, the Supreme Court went out of its way entirely to observe that the federal "act of state" doctrine must apply even though that case was brought into the federal courts in New York by diversity of citizenship and New York recognized an "act of state" doctrine all but identical to the federal one. The "act of state" doctrine, like the doctrine of *forum non conveniens*, is a prudential doctrine of judicial self-limitation in an international context. *See* R. Falk, *The Role of Domestic Courts in the International Legal Order* 9 (1964)(the "decision to defer [under the act of state doctrine] is a way of explaining that a domestic court is not a suitable forum within

which to make the determination of validity. In this respect, the act of state doctrine resembles the doctrine of *forum non conveniens*"). The foreign Sovereign Immunities Act is another example of the supremacy of federal law when international interests are implicated: it necessarily preempts inconsistent state laws beause it must be applied in *all* U.S. courts, state and federal. *See* 28 U.S.C. Sect. 1602 *et seq*. Federal foreign policy interests do not disappear when purely private foreign parties come before U.S. courts. Even in the seemingly domestic setting of a third-party indemnification complaint in a products liablity case, the Supreme Court has recently commanded the state courts to rethink their analysis of personal jurisdiction in light of the inherent foreign policy

implications:

> The procedural and substantive interests of other nations in a state court's assertion of jurisdiction over an alien defendant will differ from case to case. In every case, however, those interests, as well as the federal interest in its foreign relations policies, will be best served by a careful inquiry into the reasonableness of the assertion of jurisdiction in the particular case, and an unwillingness to find the serious burdens of an alien defendant outweighed by minimal interests on the part of the plaintiff or the forum State. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *United States v. First National City Bank*, 379 U.S. 378, 404, 85 S.Ct. 528, 542, 13 L.Ed.2d 365 (1965)(Harlan, J., dissenting).

Asahi Metal Industry co. v. Superior Court of California, Solano City, 107 S.Ct. 1026, 1034-35, 94 L.Ed.2d 92 (1987). In situation after situation, Congress and the Supreme Court have made the availability of courts in the United States to foreign plaintiffs and against foreign defendants exclusively a matter

of federal law, and they have consistently mandated self-restraint in asserting jurisdiction over arguably foreign disputes.

As we have noted, the doctrine of *forum non conveniens* arises from and has long been a part of the maritime law of this nation. This should not be surprising, considering that the inherently transnational nature of shipping creates international controvesies; maritime actors, by the nature of their business, cannot avoid sufficient "minimum contacts" to subject themselves to the jurisdiction of many nations. these jurisdictional minima are not enough to protect maritime actors:

> [T]he virute and utlizity of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it

> is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.

Lauritzen v. Larsen, 345 U.S. 571, 581, 73 S.Ct. 921, 926, 97 L.Ed. 1254 (1953). By comparison, non-maritime commercial actors can do a huge volume of business in the United States wihout subjecting themselves to jurisdiction by simply avoiding direct territorial contacts. *See Ashahi Metal Industry Co.* (assertion of jurisdiction over Japanese manufacturer of tire valves by California violates due process; despite large number of sales in California of tire tubes incorporating its valves, Japanese valve maker does not directly solicit business or make sales there). When foreign and domestic admiralty defendants are haled into court in the United States, our maritime law has long

afforded them many protections, including the "defense of inconvenience," to avoid having to defend themselves in the United States against claims under U.S. law when a more optimal forum or more appropriate law is available.[15] It is

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15. Domestic maritie defendas operate in an international context, and the reasons behind the rule of *forum non conveniens* apply to their extraterritorial activities with equal force. In discussing the related problem of the extraterritorial reach of domestic law, professor Richard Falk has written:

> Rare use is made of the competence conferred upon a state by the nationality principle [of legislative and adjudicative jurisdiction]. This generally spares Americans abroad from the burden of conforming to a legal standard in addition to the one established by the territorial state. It also saves the United States from making inconvenient assertions of legal control in which the tribunal would find itself often quite remote from the evidence, the context of the occurrence, and witnesses .... This encourages a reciprocal deference and simplifies the legal superstructure of the private lives of those who cross borders.

R. Falk, *The Role of Domestic Courts in the International Legal Order* 40 (1964).

precisely one crucial prudential choice - the convenience of the forum and its fairness to the admiralty defendant in the international context - that the Texas statute appears to abrogate.

The Supreme Court has fought a long maritime battle against the kind of parochial thinking embodied in the Texas "open-forum" law. In *Lauritzen*, for example, the Court gave a limiting reading to the all-inclusive language of the Jones Act because of considerations of comity and self-restraint.

> [C]ourts of this and other commerical nations have generally deferred to a non-national or international maritime law of impressive maturity and universality. It has the force of law, not from extra-territorial reach of national laws, nor from the abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.

> International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own.... [I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

Lauritzen, 345 U.S. at 581-82, 73 S.Ct. at 927-28 (footnotes omitted). All of this cautionary language in Lauritzen obviously applies with equal force in the *forum non convehniens* context.

Twenty years later the Supreme Court was still chiding the lower courts about their tendency to accept admiralty jurisdiction over everything. Our court

had refused to enforce a choice-of-forum clause in a contract between sophisticated international maritime businesses. The Court rebuked us:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts.... [I]n an era of expanding, world trade and commerce, the absolute aspects of the doctrine [that choice-of-forum clauses are unenforceable] have little place and would be a heavy hand indeed on the future development of international commercial dealings by Americans. We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

M/S BREMEN v. Zapata Off-Shore Co., 407 U.S. 1, 9, '92 S.Ct. 1907, 1912, 32 L.Ed.2d 519 (1972).

The *Lauritzen* and *Zapata* cases are two examples of a clear national policy of judicial self-restraint in the maritime field. Federal maritime law

tries to implement a policy balanced between allowing aliens to sue in our courts and under our laws when appropriate while rejecting attempts to make the United States the forum and lawmaker for the world's maritime defendants. The Texas "open-forum" law, on the other hand, could make one of the united states an open world forum, and with that would follow distorting effects on international commerce and regulation. Ultimately Sect. 71.031, if Madam Choo's interpretation is an accurate prediction of Texas law, could hardldy fail to affect foreign relations, as the Texas courts entertain actions by aliens against aliens for occurrences on alien soil or waters in derogation of the judicial and administrative power of the domicilliary countries and the place of the wrong.

The doctrine of *forum non conveniens* is the heart and soul of the federal policy of judicial self-restraint in the day-to-day workings of the maritime law. Texas cannot be allowed to thwart that policy in a maritime case brought to its courts.[16]

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16. *Forum non conveniens* is sometimes viewed as a discretionary doctrine that focuses on the forum's own interest in the matter. The idea is that each forum must look primarily to its own interests to decide whether it is an inconvenient place to try a pending lawsuit. From this premise, Madam Choo concludes that federal law should not control the Texas courts' determination of convenience or inconvenience in a given case. We agree. Federal courts may not enjoin or even second-guess a state court that has exercised its discretion to either retain or dismiss a maritime case after applying the maritime *forum non conveniens* law, whatever the result. Our argument goes to whether the Texas *legislature* should be allowed to prohibit its courts from performing their discretionary duties under the federal maritime law. It is the peculiar *res judicata* posture of this case that absolutely forecloses further consideration of it by the Texas state courts.

Not long ago, Congress amended the Jones Act to deny a cause of action to foreign workers injured while engageing in the offshore exploration or development of minieral or energy resources in foreign waters, unless the person bringing the action is able to establish that there is no other remedy available. *See* 46 U.S.C. Sect. 688(b) (as amended by Pub.L.No. 97-389, 96 Stat. 1949, 1955, Sect 503(a)(1982)). The legislative history makes it clear that Congress intended to codify judicial decisions dismissing claims under the Jones Act by foreign offshore workers under the doctrine of *forum non conveniens*. *See Vaz Borralho v. Keydril Co.*, 710 F.2d 207, 210-11 (5th Cir.1983). We assume that no one would dare argue that the Texas courts could refuse to dismiss a Jones Act claim

barred by Sect. 688(b) under the authority of Sect. 71.031. Why should the result be any different when the federal maritime law at issue is judge-made rather than statutory?

H. Conclusion

Today we must decide whether Texas may apply Sect. 71.031 in maritime cases brought in her courts. The district court's injunction of the state proceeding is proper if and only if the original federal court determination of the parties' rights and obligations is *res judicata*; and the federal judge is *res judicata* if and only if the Texas courts are *not* free to apply their "open-forum" law to actions that come within the maritime jurisdiction of the federal courts. Our concern, however, is broader than the narrow facts of this case.

In *Kassapas v. Akron Shipping Agency, Inc.*, 485 So.2d 565 (La.Ct.App. 5th Cir.), *writ denied*, 488 So.2d 203 (La. 1986), a Louisiana Court of Appeal reversed a trial court's dismissal of a maritime case on the ground of *forum non conveniens*. The plaintiffs originally sued for wrongful death under the Jones Act and the general maritime law of the United States in the federal district court for the Southern District of New York. The district court noted that the plaintiffs and the plaintiffs' decedents were Greek, the owner of the vessel was a Liberian corporation with its principal place of business in Greece, the manager of the vessel was a Greek corporation, the charterer was a Panamanian corporation, and the deaths were alleged to have occured in the port of Leningrad in the Soviet Union. The

district court held that it was a *forum non conveniens* and conditionally dismissed the case. *Kassapas v. Akron Shipping Agency, Inc.*, 578 F.Supp. 400 (S.D.N.Y.), *aff'd mem.* 738 F.2d 418 (2d Cir.1984).[17] After the dismissal by the federal district court, the plaintiffs found the vessel in Jefferson parish, and brought the identical claims in the state courts of Louisiana. The trial court dismissed the action as *forum non conveniens*. The state Court of Appeal reversed, citing dubious federal authority for the proposition that *forum*

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17. As of the date of this opinion, none of the citation services - Shepard's, Westlaw, or Lexis - shows the Second Circuit's affirmance of this case. The Second Circuit clerk's office has confirmed that the unpublished opinion of May 23, 1984 (Docket No. 84-7196, listed at 738 F.2d 418), affirmed the February 8, 1984, Memorandum and Order (Docket No. 82 Civ. 6954 (MP), reported at 578 F.Supp. 400).

non conveniens is "procedural",[18] and holding that the doctrine is not recognized in Louisiana law and could *not be applied by the trial court. As we have shown, Kassapas* was plainly wrong. We are concerned that two major maritime states in this Circuit appear to be willing to disregard federal *forum non conveniens* doctrine in maritime cases brought to their courts.

For all these reasons, we reject Madam Choo's argument that Sect. 71.031

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18. The *Kassapas* court cites *Missouri ex rel. Southern Ry. Co. v. Mayfield*, 340 U.S. 1, 71 S.Ct. 1, 95 L.Ed. 3 (1950), for the proposition that *forum non conveniens* is a "procedural" device. *Mayfield* held that states were not compelled by federal law to retain jurisdiction over FELA cases that would be dismissed under an impartially applied *forum non conveniens* doctrine of state law.

fundamentally alters *forum non conveniens* in this case and that the deferral of her claims to Singapore by the federal court is not *res judicata* in a Texas state court. Under the federal uniformity doctrine state courts *must* apply the *forum non conveniens* rule of the general maritime law in any case brought before them by citizens of foreign lands over which the federal courts would have admiralty jurisdiction. State law inconsistent with that doctrine cannot be applied in a maritime case. *Accord Couch v. Chevron International Oil Co.*, 672 S.W.2d 16 (Tex.App.-Houston [14th Dist.]1984 writ ref'd, n.r.e.); *but cf. Couch v. Chevron International co.*, 682 S.W.2d 534 (Tex.1984); *contra Kassapas*, 485 So.2d at 567. Therefore, we affirm the district court's injunction of the state

court proceeding as *res judicata* on the ground that Texas may not apply its "open-forum" law in a maritime case and there is no other new issue to be litigated. It is time for this litigatio to come to an end in the United States and to return to Singapore, where it belongs. Because of the complexity of this case, the sanctions against Mandam Choo's attorneys are DISSOLVED, but the issuance of the permanent injunction by the district court is AFFIRMED.

CLARK, Chief Judge, concurring:

I concur in the result reached by Judge Gee because it upholds the district court's order, the pertinent part of which is set out in the margin.[1]

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1. "ORDERED that Chick Kam Choo and her attorneys, Benton Musslewhite and Joseph C. Blanks, be and are hereby permanently enjoined from prosecuting or commencing any causes of action or claims against

The federal court heard the parties, considered the matters before it and reached a decision that the contested issues should be litigated in Houston in the interest of justice. That decision was not appealed and became final and binding as between the parties. All proceedings in that case were closed. The district court did no more than order *parties* that had been subject to its jurisdiction to give effect to the

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Exxon corporation and/or Esso Tankers, Inc., in the courts of the State of Texas or any other state, and in particular Cause No. 84-00125 pending in the 270th District Court of Harris County, Texas, arising out of or related to the alleged wrongful death of Leong Chong, which occurred onboard the Tanker ESSO WILHELMSHAVEN on or about March 24, 1977, in Singapore. This Injunctive Order is binding upon and applies with equal force to the Defendants, their agents, servants and upon those persons in active consent or participation with them."

adjudication of an issue raised by and finally decided as between them. The jurisdiction that court undeniably had at the time the adjudication was made confers the inherent power to effectuate that final decision. I recognize that injunctions addressed to paties can impact on courts in which they litigate and that federal law limits such intrusions. 28 U.S.C. Sect. 2283. However, the exercise of the power to effectuate a judgment is an express exception to the limiting force of Sect. 2283. More importantly, this case presents no reason to draw courts or court systems into what is essentially nor more than an attempt by a dissatisfied litigant to thwart a binding order she does not like.

Today's dispute does not implicate Texas courts or Texas law. It could be

resolved entirely within the perimeters of the federal forum. Since Choo has acted to violate a final, binding order of the federal court, entered at a time when both parties were subject to its jurisdiction, that court can order them to end the violation. The fact tha' Texas courts might not use the same principles of adjudication furnishes only the condition that permits the violation to occur. Texas may permit, but it surely does not require, that Choo use its courts. No vested right to try this case in a Texas court in Houston is impaired by the federal forum's protection of its judgment. There is no need to raise or resolve questions of sovereignty, preemption, comity or *res judicata*.

Assuming *arguendo* that the power of this court to protect or effectuate its

final judgment somehow does not extend to proscribing subsequent, negating acts of parties over whom it had jurisdictin, I agree with Judge Gee that the maritime nature of the order enetered in the present controversy would preempt the inconsistent exercise of state court jurisdiction.

REAVLEY, Circuit Judge, dissenting.

It is for the Texas court to decide its own forum convenience and to identify the issues subsidiary to that determination. Texas law may permit the *Choo* case to be entertained without regard to any issue resolved by the federal court. This court is not entitled to say otherwise, though my colleagues do just that.

Contrary to what Chief Judge Clark says, Choo has not violated a final,

binding order of the federal court. The court merely dismissed her case, without prejudice, for *forum non conveniens* reasons. The court did not adjudicate Choo's right to bring her action in Texas state courts.

The majority are prepared to announce a bold new rule of preemption and to nullify the Texas open forum law for admiralty cases. If that be good law, this is not the time or place to declare it. I would prefer that the Texas courts decide Texas law, and that another court, preferably the Supreme Court, after full consideration, decide whether to sweep so far.

The Court tells us that "[a]ny doubts as to the propriety of a federal injunction against state court proceediuld be resolved in favor of

permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281, 297, 90 S.ct. 1739, 1748, 26 L.Ed.2d 246 (1970). My colleagues fail to heed. I dissent.